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AN INTERDISCIPLINARY QUARTERLY REVIEW

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HUMAN DIGNITY: REASON OR DESIRE?

Natural Rights versus Human Rights

Frank van Dun*

The Universal Declaration of Human Rights (henceforth UD) was introduced in Paris on December 10, 1948, in the aftermath of World War II and the long period of economic depression and political turmoil that preceded it. Although the UD was generally praised, it did not have an immediate impact on the legal profession. For example, as a law student from 1965 to 1970, I heard nothing about it apart from a brief mention in a course on international law.

I did read the document, however, in 1968, when the media drew attention to its twentieth anniversary. I confess that I was shocked. I read with distaste and disbelief the UD's message that a person's fundamental rights were none other than to be treated without cruelty and taken care of by the powers that be. My first impression was that it was adapted from the charter of some society for the protection of animals, with humans in the role of animals and governments in the role of their keepers. My thinking about rights, undeveloped as it then was, clearly was inspired by sources other than the UD. It was not until later that I discovered how different those sources were.

Today, the UD's human rights have become almost universally accepted among lawyers, law students, and the general public as the indisputable basis from which all profound thinking about rights must start. The occasional charge that the UD is too much imbued with

*Faculty of Law, Maastricht University. An earlier version of this paper was presented to Prof. H.F.M. Crombag on September 22, 2000, on the occasion of his retirement, and was included in his *Liber Amicorum*, ed. N. Roos and P. van Koppen (Maastricht: Metajuridica Publications, 2000).

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Western ethical and political values to deserve the epithet "universal" is noted, but not taken seriously. Nevertheless, that criticism merits consideration. While it is true that those who make it are, all too often, no more than ideologues of fashionable "cultural relativism," it is equally true that the UD's underlying philosophy of the nature of humans only came into vogue fairly recently, even in the Western world. It does not fit in the long tradition of law and justice from which the notion of rights derives its status as a basic ingredient of serious thought about human relations and interactions. In fact, the UD has obscured the meaning and significance of that tradition.

My starting point for reflecting on human rights is a remark by my friend and colleague Hans Crombag concerning the current fascination with human rights. He finds human rights "sympathetic but naive."[1] In his view, they are sympathetic because they are well intentioned, but naive because they are a legacy of the classical theory of natural law.

I disagree with him on both points. I have little sympathy for the human rights doctrine of the UD—and not only for the reason mentioned above. I also believe that whatever good it can do could be done equally well under the aegis of the classical theories of rights. Moreover, over the past fifty years, the UD has generated a hyperinflation of rights that can only destroy the value of rights altogether.

However, what must be stressed is that the UD's doctrine of human rights is neither naive nor a legacy of classical natural law theory. As I shall argue below, it is a legacy of the sophisticated political philosophy of Thomas Hobbes, and, as such, a repudiation of everything for which classical natural law stood.[2] The logic of the UD's doctrine of

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[1]H.F.M. Crombag, "Sympathetiek, maar naief," chap. 30 in *De man van Susquehanna* (Amsterdam: Contract, 2000). See also his *Een manier van overleven: Psychologische grondslagen van moraal en recht* (Zwolle: Tjeenk Willing, 1983), pp. 14–21.

[2]I do not intend to add to or comment on the long debate on the relationship between the classical theories of natural law (in the tradition of Aristotle and Saint Thomas) and natural rights (the Lockean tradition). That debate goes back at least to Leo Strauss's classic *Natural Right and History* (Chicago: University of Chicago Press, 1953), and the works of Michel Villey, which present natural rights as a radical "modern" departure from the classical Aristotelian and Thomistic theory of natural law. See, e.g, Michel Villey, *Seize essais de philosophie du droit* (Paris: Dalloz, 1969); Michel Villey, *La Formation de la*

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human rights is remarkably similar to that of Hobbes's theory of the natural right of man—and both are very different from the logic of the classical theories of natural law and natural rights. As Crombag's remark illustrates, and my experience with generations of law students amply confirms, people all too easily assume that human rights are tributes to be paid to the dignity of man as defined by the grand tradition of Western law and justice. The purpose of this paper is to refute that assumption.

HUMAN RIGHTS IN THE UNIVERSAL DECLARATION

A Dilemma

In a superficial reading, the UD seems to contain several elements that should be acceptable without further comment. They are sometimes likened to the rights of man that figure so prominently in such older documents as the French Declaration of the Rights of Man and Citizen (1789) or the American Bill of Rights, or such influential books in the tradition of natural rights as Locke's *Second Treatise*. Articles 3, 4, 5, 9, 10, 11, 12, 13, 16, and 17 of the UD are in this category. Other elements also remind us of such precedents. However, they do not concern the rights of man as such, but rather the rights of the citizen, i.e., the rights of members of "political associations" (e.g., states). Examples are found in articles 6, 7, 8, 15, and 21.

It is noteworthy that, unlike its predecessors, the UD does not explicitly distinguish between human rights and citizen rights. For example, in the Declaration of the Rights of Man and Citizen, the rights of man appear as natural rights, the rights of the citizen as no more than artificial constructs. Indeed, in its Article 2, the French Declaration states unambiguously that the protection of the natural rights of man is the *raison d'être* of every political association.[3] Consequently, the

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pensée juridique moderne, Nouvelle édition corrigée (Paris: Montchrétien, 1975); and Michel Villey, *Le Droit et les droits de l'homme* (Paris: Presses universitaires de France, 1983). See also F.D. Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: Clarendon Press, 1995); and B. Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997).

[3]Art. 2, Déclaration des droits de l'homme et du citoyen, 1789: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression." ("The end of every political association is to preserve

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rights of the citizen are presented as mere tools designed to further that end. It was probably no mere oversight that the authors of the UD did not make that distinction. As we shall see, it is a distinction that does not make sense within the basic philosophy of rights that appears to underlie the whole document.

Of course, the distinctive elements of the UD are the "economic, social, and cultural rights" found in Articles 22 through 28. Without these, there would have been no reason to make an issue of the Declaration, since its other elements had been expressed more clearly and elegantly elsewhere. The tone is set in Article 22:

> Everyone, as a member of society, has the right to social security and is entitled to the realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

Among the rights listed, we note the rights to work, free choice of employment, just and favourable remuneration and conditions of work, and rest and leisure, including periodic holidays with pay. In addition, there is "a right to an adequate standard of living" (Art. 25), which includes food, clothing, housing, medical care, and all sorts of social security.

Article 26 mentions "a right to education." It turns out to be primarily a right to schooling, which in some cases should be at once free, compulsory, and according to the choice of the parents. Such schooling should be directed "to the full development of the human personality and to the strengthening of respect for human rights and

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the natural and life-long rights of man. These rights are freedom, property, security against arbitrary arrest, and resistance against oppression.")

With respect to those natural rights, Laborde de Méréville had insisted, in a suggested Preamble, that "il est surtout indispensable d'ôter au corps législatif tous les moyens d'en abuser, en le renfermant dans la défense des droits de l'homme." ("above all, it is necessary to deprive the legislative body of all the means of abusing its powers by restricting them to the defence of the rights of man.") Quoted in S. Rials, ed., *La déclaration des droits de l'homme et du citoyen* (Paris: Hachette, 1988).

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fundamental freedoms," and promote "understanding, tolerance, and friendship among all nations, racial or religious groups, and the activities of the United Nations for the maintenance of peace."

According to Article 27, "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits." Finally, Article 28 declares that "everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised." Apparently, the "right to the United Nations" is a human right as well.

The UD presents such economic, social, and cultural rights simply as human rights, as if they are of the same nature and on the same level as other rights, with their seemingly respectable ancestry. Anyone familiar with the classical doctrine of natural rights will see—and it has been said many times—that the UD's distinctive "rights" are incompatible with that doctrine. Enforcement of one person's economic, social, and cultural rights necessarily involves forcing others to relinquish their property, or to use it in a way prescribed by the enforcers. It would, therefore, constitute a clear violation of their natural right to manage and dispose of their lawful possessions without coercive or aggressive interference by others. It would also deny a person the right to improve his condition by accepting work for what he (but perhaps no one else) considers an adequate wage.

We have a dilemma here: either the "old" rights of the UD are indeed the natural rights of the tradition—which would mean that the whole document is inconsistent propaganda—or they are consistent with the rest of the document—which would mean that they cannot be assimilated to the tradition of natural rights and natural law.[4]

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[4]A few clauses in the UD do identify aspects of genuine natural rights as well as traditional "rights of the citizen." Interestingly, though, they are not presented as rights, but as absolute prohibitions imposed on everyone in general or political authorities in particular. Examples can be found in Article 4 ("No one shall be held in slavery or servitude"), Article 5 ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment"), and Articles 9, 11, 12, 15, and 17. They are clear examples of "negative rights": anyone can respect them merely by not doing something to a person without his consent.

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To mitigate the inevitable conflicts of rights implied by the first hypothesis, lawyers and legal theorists often propose to rank various human rights as being more or less important than others.[5] By ranking them in some hierarchical order, they hope to provide guidelines for weighing rights. However, this strategy is no more than a pragmatic evasion of the problem of inconsistency. Even so, it only works where there is a genuine consensus on the relative importance of conflicting rights—a condition not likely to be fulfilled in the world of politics.

I shall consider only the second horn of the dilemma. I shall take the UD seriously and not dismiss it (as lawyers long did) as a politically powerful blast of hot air without relevance to questions of law and justice.

In truth, the UD was a political compromise, the product of inputs from different parties with incompatible beliefs and ideologies. Most people now, however, seem to think that human rights are, in fact, those outlined in the UD, or perhaps any "rights" of the kind the document so prodigiously attributes to us. Even among lawyers, the idea that the UD's human rights are fundamental rights is now quite common (at least in the Western world). Whatever the actual history of its drafting, the document has come to be seen as a coherent doctrine of human rights. It does not follow, however, that it merely continues the tradition of the Rights of Man. The UD's Preamble refers to Franklin D. Roosevelt's "Four Freedoms" as "the highest aspirations of the common people." This suggests that those who wrote the Preamble did not intend the UD to be interpreted in terms of the classical theory of natural law and natural rights and its associated political ideal of a constitutional regime committed to the rule of law and substantive due process. It suggests, rather, that they intended the UD to be read as an

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[5]For an early formulation of this strategy, see, e.g., H. Coing, *Grundzüge der Rechtsphilosophie* (Berlin: Walter De Gruyter, 1969), pp. 222–23: "Zwischen den verschiedenen Grundrechten besteht eine bestimmte Rangordnung, die sich aus der in der Rechtsidee enthaltenen Rangordnung ergibt. Die geistigen Grundrechte gehen der Ehre, beide den ökonomischen Grundrechten des Eigentümers vor." ("There is a certain ranking among the different fundamental rights that is implicit in the idea of Law itself. The spiritual rights precede the economic rights of the proprietor.") As if there were only one uncontested Rechtsidee!

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original manifesto of the philosophy of the welfare state. One way to summarize the UD is by saying that people have a right to live in a welfare state without having qualms about its unprecedented peacetime powers of social control and mobilization.[6] The statement must, of course, be qualified. Only the welfare states of the victorious Allies (including the Soviet Union), not those of the defeated Axis powers, were to be the homes of human rights.

Contradictions and Practical Problems

In one sense, Crombag's use of the word naive in describing the UD's conception of human rights is understandable. Not only is their enumeration chaotic, but they also seem to be full of both logical and practical contradictions. For example, what the UD tells us about education and working defies common sense. How can we reconcile free choice of employment or education with the idea that labour should receive just and favourable remuneration or that education should be free (i.e., 100 percent subsidised)? What are we to make of Article 28

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[6]On the drafting of the UD, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

From the first day of his presidency, ten years before the U.S. joined the fray of World War II, Franklin D. Roosevelt saw himself as a war leader. He exploited the sense of crisis (and, with his long banking holiday of 1933, possibly provoked a real financial emergency). In his Inaugural Address, he began the push for "broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe." He even based his authority for closing the banks on the Trading with the Enemy Act of 1917, a World War I measure. Indeed, according to J. Garraty, in "The New Deal, National Socialism, and the Great Depression," *American Historical Review* 78 (1973), p. 932, "The crisis justified the casting aside of precedent, the nationalistic mobilization of society, and the removal of traditional restraints on the power of the state."

We should not forget the fascination with war, strong leadership, national planning, technocratic management, and the like that characterised the intellectual and political elite of the first half of the century. On this, see Robert Higgs, *Crisis and Leviathan* (New York: Oxford University Press, 1987), p. 169. This fascination is as apparent in the UD as it is in "the welfare state [, which] is an offspring of the total warfare of the industrial age." B. Porter, *War and the Rise of the State* (New York: Free Press, 1994), p. 192.

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and its right "to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised"? The full realisation of almost any one of the "rights" in the UD would impede the implementation of almost any other! The majority of the human rights mentioned in the UD are exposed to the risk of a conflict of rights. Most of them are indeed "rights" to resources that are in short supply relative to the quantities needed to satisfy the desire for them.[7] Should we conclude that a human being's fundamental "right" is what can be possible only in Utopia, that Nowhereland where there is enough of everything for everyone, and where, consequently, there are no choices to be made, no costs to be borne, and where frustration is not to be feared?

Even in the richest states, budgetary limitations often lead to sharp confrontations between pressure groups and vested interests in various social, economic, and cultural domains. Using the term "human rights" to describe one's interests does not change this fact of real-world limits. Rather, it creates the risk of inflating political rhetoric and passion, now that the flag of human rights flies over almost the whole arena of government policy. Each policy option can be interpreted at one and the same time as both a measure to further some human right and as an indication of the neglect or even violation of any number of other human rights. Therefore, there is at all times unlimited room for weighing various "rights" and for setting and revising priorities. The political and administrative bodies to which this weighing of rights has been entrusted or that have succeeded in monopolising it have ample opportunities for expanding their power and influence.

Nothing remains of the old idea that a right is worthy of respect in all circumstances except, perhaps, the most extreme emergency. The human rights of the UD are not and cannot be absolute, even in the most normal of circumstances—unless anything short of Utopia should count as an emergency.[8] By their very nature, they are susceptible to

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[7]Scarcity in connection with desire is crucial here. The economic concept of scarcity relative to "effective demand" is not relevant. The UD does not hold that we have rights only to such things as we are willing and able to produce or pay for.

[8]This is a familiar fallacy. Thomas Hobbes used one version of it when he gave his expansive definition of war and correspondingly strict definition of peace. See Thomas Hobbes, *Leviathan: or, the matter, forme & power of a*

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continuous weighing, negotiation, and qualification. They are a politician's delight, for every human right translates into "a right to more government intervention on its behalf."

This is no less true for the ghosts of natural rights that linger in the first half of the UD than for the economic, social, and cultural "rights" in the rest of it. Of course, we should not confuse the ghost and the real thing. For example, Article 2 of the French Declaration of the Rights of Man and Citizen clearly states what a person's natural rights *are*: liberty, property, freedom from arbitrary arrest, and resistance to oppression.[9] In the UD, on the other hand, a person is not informed that his life, liberty, security of person, and property *are* his fundamental rights. He is told only that he has the right to life, liberty, and security of person (Art. 3) and property (Art. 17).[10] He should not expect more. For it is obviously inconsistent to claim that everyone is entitled to the full realisation of the economic, social, and cultural "rights" and at the same time to claim that any person's fundamental rights are *his* life, liberty, and property. The administration of the former requires the concentration of massive coercive powers of taxation and regulation in the hands of the state, and so must presuppose that a person's life, liberty, and property are *not* his rights. However, this inconsistency evaporates once we realise that the UD's "rights to life, liberty, property" do not specify to *whose* life, liberty, or property a person has a right. It rules out the possibility that he has an exclusive right to *his own* life, liberty, or property, but it *does not* rule out that some or all

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commonwealth,ecclesiasticall and civill, ed. A.R. Waller (Cambridge: Cambridge University Press, 1935), chap. 14. Equating even the remotest risk of conflict with the war of all against all, he argued that comfort and commodious living would be possible only under the strictest form of centralised absolutism. As Leibniz remarked, "Hobbes's fallacy lies in this, that he thinks things which can entail inconvenience should not be borne at all—which is contrary to the nature of human affairs." See Leibniz, "Caesarinus Fürstenerius," in *Leibniz: Political Writings*, ed. Patrick Riley (Cambridge: Cambridge University Press, 1988), p. 119.

[9]See note 3 above. "Freedom from arbitrary arrest" (*sûreté*) and "resistance to oppression" are not genuine natural rights. Rather, they are reflections of the duty of any legitimate government to respect natural rights.

[10]The relegation of "the right to property" to Article 17—i.e., its separation from the rights to life, liberty, and security of person, with which it has been linked traditionally—is certainly worthy of note.

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others have an equal, or perhaps more pressing, claim on those things in order to enable them, say, to enjoy the arts or a paid holiday.

Thus, a person's life, liberty, and property are thrown upon the enormous heap of desirable scarce resources to which all people are said to have a right. As such, they, too, end up in the scales with which political authorities, administrators, and experts are supposed to weigh the ingredients for their favoured policy-mix. Here we catch our first glimpse of the shadow of Hobbes behind the contemporary notion of human rights: the person who believes he has "a right to everything" is likely to find out that there is no thing that is his right.

A Hobbesian Predicament

The following thought experiment will bring out the Hobbesian character of the UD's conception of human rights. Imagine two people, the only survivors of a shipwreck, who find refuge on a small deserted island. They have with them nothing but their human rights, in particular their "right to work" and all that it entails according to Articles 23, 24, and 25 of the UD. One can imagine what will happen if they sit there insisting on their "right" of being employed by the other at a just and favourable wage, or to receive an unemployment compensation high enough to allow them an existence worthy of their dignity. One can also imagine what will happen if, instead of just sitting there, they attempt to enforce their human rights against one another: their own version of Hobbes's war of all against all. Finally, one can easily imagine what would happen if one of them won that war: Hobbes's solution for the incompatibility of their "rights" would emerge. The winner could then arrange for himself a nice unemployment compensation (e.g., a tax on another's labour) to match his new-found dignity as a ruler, and keep the other man quiet by leaving him as much as is consistent with "the organisation and the resources of their state."

Indeed, starvation, universal war, and the Leviathan State are the only possible outcomes under a regime of human rights—and only the latter outcome is compatible with survival. Imagining a two-person situation makes this conclusion clear, but its validity does not depend on the numbers. Large numbers only serve to obscure the logic of the situation. They may induce the illusion that the ruler is simply "out there," at no extra charge, protecting the human rights of his subjects, when, in fact, he is continuously testing their ability to pay and endure while keeping the burden of taxation and regulation just below the threshold of revolt.

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Of course, the two men need not be so foolish as to insist in any way on their human rights. They may have enough sense to understand the natural laws of living together and settle for their natural rights, respect each other and each other's work (property), and try to agree on mutually advantageous exchanges. Indeed, they might be satisfied with the claim that, for each of them, his life, liberty, and property are his only fundamental rights, and that the only thing to which either has a "right" is respect for their natural rights.

RIGHTS IN THE CLASSICAL TRADITION

Claims and Rights

The connection between the UD's notion of human rights and Hobbes's political philosophy is far from fanciful. It rests on formal and material similarities that show both of them to be instances of the same concept of "rights"—a concept that is incompatible with the classical natural law tradition. As to their form, the UD's human rights are "rights to."[11] As to their material content, they are "rights to desirable things"—that is to say, to things that most people desire. Thus, they appear to be specific forms of some generic right to the satisfaction of desire. As the UD does not attempt to identify a foundation for its validity, we have to presume that "the right to the satisfaction of desire" is itself the fundamental human right. That, in a nutshell, seems to be the UD's philosophy of human rights. It is also the kernel of Hobbes's purported emendation of the classical theory of natural rights, though it plays no part in the classical natural law tradition.

Neither in the classical tradition nor in the normal business of law can "rights to" count as fundamental rights; they are claims, rather than rights. In fact, to be "rights to," they must be lawful claims, which logically presuppose some right as the ground for their validity. If you sell your car to me, you have a right to payment of the price we agreed on. The reason is not that you have some generic "right to money" or "right to payment." The reason is that, once you have met your obligations under the contract, you have acquired ownership of the specified sum of what until then was my money. Consequently, if I neglect or refuse to pay, you have a lawful claim to the money because it is now yours. Similarly, the victim of theft has a "right to" the stolen goods,

[11]There are a few exceptions. See note 5 above.

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or to adequate compensation, because they are his goods—not because he has some generic "right to goods."

As a general proposition, we may say that a person has a lawful claim to ("right to") respect for his rights.[12] Rights to specific performances or things are particular forms of the lawful claim to respect for one's rights. Thus, according to the classical theory of natural rights, I can say that I have a right to (respect for) *my* life, *my* liberty, and *my* property, because those things are *my* rights—not because I have some generic right to life, liberty, and property. Lawyers and judges spend a lot of time establishing the rights of parties to determine which has a lawful claim against the other. They normally do this by looking at the facts and the history of the events leading up to the institution of proceedings, i.e., by a careful and objective distinction of the parties, their personal identities, words, works, actions, possessions, and relations. Of course, when legislative interference corrupts the normal business of the law, the facts that, in the absence of such interference, would be relevant to determine the rights of the parties are often set aside. Claims are then accepted merely because they have a basis in what the legislative authority says the various parties have a "right to." However, in that case, lawyers and judges are no longer preoccupied with questions of law and justice, but with trying to figure out on whose side the authorities stand.

Human Dignity and Human Nature

The UD presents human rights as "rights to"—that is, as lawful claims—but does not say anything about the foundation of their validity. We have to make do with references to "human nature" and "human dignity" in Article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood." The text suggests that all human beings possess dignity, but this only reminds us that the word "dignity" is understood here in a special sense. It is obviously not true that all human beings have dignity in the ordinary sense of the word. There is daily proof of this in any newspaper or newscast, or, for those who find that sort of evidence too depressing, in almost any broadcast of the *Jerry Springer Show*.

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[12]See Frank van Dun, *Het fundamenteel rechtsbeginsel: Een essay over de grondslagen van het recht* (Antwerpen: Kluwer, 1983).

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The reference to "human dignity" is a commonplace of the philosophy of law, but there the term has a more technical definition. It refers to the fact that people as such have rights that they are lawfully obliged to respect regardless of their opinions of each other's personal dignity. However, the term does not specify those rights, and it does not specify why people as such have them. Without an unambiguous reference to an objective foundation for fundamental rights, "human dignity" is an empty shell.

The classical foundation, of course, is the fact that a human being is an *animal rationis capax*, a physical, living being distinguished from other forms of life by his rational faculties. Because of these rational faculties, a human being is not just a physical agent but a "moral agent" capable of acting on the basis of reasons and of criticising and evaluating reasons for acting in the light of various goals and values. As such, a human being is a *natural person*, a free agent with a modicum of rational control over his own body, its actions, and their outcomes—his life, liberty, and property. These are his natural rights, i.e., the things that his rational faculties, by nature, control.[13] To this observation, the classical theory of natural rights adds that one human person is just as much a human person as is any other. There is no natural hierarchy of natural persons. In consequence, there is no natural hierarchy among one person's natural rights and those of another. As Locke wrote:

> There being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection.[14]

Hence, it follows "that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."[15] Every person is to respect every other person and his natural rights: *no person has "a right to another."* Thus, according to the classical theory, one person's natural rights are limited and constrained by those of

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[13]Rights, from the Latin *recta*, controlled things (from the verb *regere*: to lead, steer, manage, control).

[14]John Locke, *The Second Treatise of Civil Government*, ed. Thomas P. Peardon (Indianapolis, Ind.: Bobbs-Merrill, 1952), chap. 2, §4.

[15]Locke, *Second Treatise*, chap. 2, §6.

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every other person. It is only because of this structural feature of the classical theory that natural rights can be seen as constituting a natural order or natural law of the human world.[16] It is an order or law of distinct and separate persons of the same species—or, to use the standard formula, a law of freedom and equality. Respect for this law is justice. There can be no doubt that Locke felt he was simply restating the foundations of law and justice as they had long been accepted. He did so in the face of an attack by the proponents of an absolutist state who had begun to invoke either a divine right of kings (Filmer) or an unconditional covenant of submission (Hobbes).

Having Rights and Being a Person

As we have seen, the second sentence of the UD's Article 1, in making the obligatory reference to human rational and moral capacities, echoes the classical foundation of rights. However, most of the human rights mentioned in the UD, and all of the human rights specific to the UD and its progeny of similar charters, have no particular relation to the rational nature of man. They have nothing to do with the "dignity" of mankind as one among many living species. On the contrary, they can be, and indeed have been, applied, with no more than a slightly different wording here and there, to animals, "ecosystems," and other things. My first impression, over thirty years ago, that the UD was little more than an adaptation from some charter for the well-being of animals, has not been dissipated by numerous subsequent readings of the document. The UD never goes further than the "right to a decent treatment" that would be the central message of any such charter.[17]

Today, it is apparently acceptable to talk about "animal rights," and not just about some sort of perfectionist moral duty of kindness and care on the part of human beings in their dealings with animals. Would

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[16]The etymologically prior meaning of "law" is "order" (Scandinavian *lag*, order, bond). Law is the social order or social bond that has its natural foundation in the plurality and diversity of distinct and separate persons. It is what the Romans called *ius*, the order of *iura*, which are bonds arising from solemn speech (*iurare*, to make a personal commitment to or covenant with another). See Frank van Dun, "The Lawful and the Legal," *Journal des Économistes et des Études Humaines* 6 (1995).

[17]The only specifically human bias of the UD is in its affirmation of the right not to be prevented from taking part in political elections or applying for a government job.

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not the reason for this be that the current harvest of human rights no more presupposes that human beings are natural persons than that "animal rights" presuppose that animals are persons? If, as the text of the UD suggests, "the satisfaction of desire" is itself the fundamental human right, should we then not discard the reference to rationality and instead accept man's covetousness as the essence of his "dignity"? But then "human dignity" can no longer be distinguished from "animal dignity." After all, there is nothing particularly human about either desire or its satisfaction.

Like human beings, animals may feel pleasure and pain, satisfaction of desire, and frustration. However, animals are not persons; it makes no sense to hold them morally responsible, inquire about the justice or injustice of their actions, insist on their good faith in contractual relations, or anything of the kind. Not being persons, they cannot have rights, except perhaps in some derivative or metaphorical sense.[18]

People who invoke "animal rights" are, in fact, claiming the authority to forcibly impose their own norms for dealing with animals on other human beings. These "animals rights" are no more than reflections of the moral duties implied in these people's perfectionist view of human morality. However, by calling these reflections "rights," they present them as if they were objective principles of animal existence; such is the rhetorical force of the word "right." Advocates of "animal rights" make an adroit use of it in claiming that legal enforcement of their moral views is justified on the basis of a lawful obligation that humans owe animals.

Likewise, human-rights policies are presented as if they were lawful obligations owed by all governments to all human beings, independent of any morality or ideology of government. However, human rights make sense only as reflections of a particular ideology of government, one that holds that governments relate to their subjects as zookeepers to the animals under their care. They certainly do not reflect the duties of a constitutionally limited government committed to the rule of law and substantive due process. That its subjects are natural persons, and, as such, have a lawful claim to respect for their life, liberty, and property, is of no relevance in the UD's worldview.

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[18]See, e.g., the rigorous conceptual analysis in A.R. White, *Rights* (Oxford: Oxford University Press, 1984).

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In that document, human beings typically appear as passive holders of "rights to" various things. However, those things are not theirs until the proper authorities have decided on the appropriate distribution. Indeed, the UD implies that governments, although elected by and from the human population, are superior to their subjects. Consequently, the UD does not need to countenance natural rights if they stand in the way of the "moral perfection" of government.[19]

Once the connection between "having rights" and "being a person" has been severed, almost anything may be said to have rights. Not surprisingly, the so-called rights revolution that has been gathering steam since the 1960s has led to a cancer-like growth of "rights," not only of human beings and animals, but also of plants, landscapes, lakes, oceans, the earth itself, historical monuments, and other cultural artefacts. Moreover, in the field of specifically human rights, the "rights" of individual human beings as such are now difficult to discern among the "rights" of an ever-increasing number of abstract "aspect-persons." Thus, the woman, the child, the homosexual, the labourer, the immigrant, the student, the patient, the consumer, the elderly, the handicapped, the victim, or the member of any group whatsoever is said to have "special rights," in particular, the "right to positive discrimination," which is the "right to privileged treatment." Indeed, the common characteristic of all such "rights" is that they are supposedly of sufficient weight to override or trump anyone's truly non-discriminatory natural rights as a human being. Compared to the dignity of the woman, the child, the worker, and so on, the dignity of the human being as such ranks near the bottom of the scale.

Human Rights, Moral Perfectionism, and Natural Law

The previous section's reference to perfectionist theories of morality could be understood as a support for Crombag's thesis that human rights are a legacy of the classical theory of natural law. Indeed, much of what goes under the name of "natural law" is more concerned with the ethical idea of moral perfection than with the problem of order in the human world. The Aristotelian-Thomistic "natural law theory"

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[19]A typical expression of this attitude is the statement on "affirmative action" in a book by a former Chief Justice of the Supreme Court of West Virginia; see R. Neely, *How Courts Govern America* (New Haven, Conn.: Yale University Press, 1981), p. 6.

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doubtlessly belongs to moral philosophy ("ethics") rather than to the philosophy of law. However, it does not imply that it is appropriate for governments to enforce moral perfection. As Thomas Aquinas put it:

> [Because] law regards the common welfare . . . there is no virtue whose practice the law may not prescribe. [However,] human law is enacted on behalf of the mass of men, most of whom are very imperfect as far as the virtues are concerned. This is why law does not forbid every vice which a man of virtue would not commit, but only the more serious vices which even the multitude can avoid. These are the vices that do harm to others, the vices *that would destroy human society* if they were not prohibited: murder, theft, and other vices of this kind, which the human law prohibits.[20]

The vices that destroy human society would be violations of natural rights. Not contaminated by the modern intellectual vice of utopianism, classical natural law theory made a pragmatic distinction between moral and political life. The former is devoted to the perfection of virtue, the latter to the perfection of the *lex humana*, the purpose of which is to safeguard society even for those who are not likely to give much attention to higher virtues. If the Thomist theory assumes, without justification, that there is some good that is the good of all,[21] it also expresses grave doubts about the possibility of making men virtuous by means of politics and legislation.[22]

In making the distinction, the classical theory of natural law was probably not anticipating the basic assumption of today's neo-Aristotelian proponents of natural rights,[23] namely, that the forms of human

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[20]Thomas Aquinas, *Summa Theologiae*, 60 vols. (Cambridge: Blackfriars, 1964–1976), IaIIae, Qu. 96, Artt. 3 and 2, emphasis added.

[21]However, it still implies that the good is to be realised in the actual life of a person. It does not commit the statistical fallacy that is evident in utilitarianism, with its *ad hoc* constructions of the "greatest good" based on de-personalised, anonymous data about wants—thus making the *greatest good* into something completely extrinsic to every person.

[22]Aristotle comments on this idea in the final section of *Nicomachean Ethics*, trans. and ed. Roger Crisp (Cambridge: Cambridge University Press, 2000). See also R. George, *Making Men Moral* (Oxford: Clarendon Press, 1993).

[23]E.g., D.B. Rasmussen and D.J. den Uyl, *Liberalism Defended: The Challenge of Post-Modernity* (Cheltenham, U.K.: Edward Elgar, 1997); D.B. Rasmussen and D.J. den Uyl, *Liberty and Nature: An Aristotelian Defense*

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flourishing or of living "a good life" are as diverse and manifold as the individual men and women themselves. On the basis of that assumption, neo-Aristotelians conclude that only natural rights are suitable objects of legal enforcement, because enforcement by a few of a particular perfectionist morality is bound to sacrifice on the altar of moral arrogance the value of life for many.

Neo-Aristotelians would not, therefore, subscribe to the view that, in principle, there is no virtue whose practice the law may not prescribe. On the contrary, they insist that the difference between morality and politics is not, as Aquinas would have it, merely a pragmatic matter, but is itself a matter of principle. Nevertheless, if given a choice, they would no doubt prefer the theologian's pragmatic distinction over the modern belief that those who want only the best for mankind should therefore be entitled to enforce their "ideals" with all the powers that today's governments have at their disposal.

If all that Crombag is saying is that the modern preoccupation with human rights is drenched in the rhetoric of moral perfectionism, I would be the last to disagree. There is, however, no reason to take that fact as proof of his claim that human rights are a legacy of the classical theory of either natural law or natural rights. If anything, it is proof that human rights are derived from some perfectionist theory of the duties of a virtually omnipotent government, not from some idea of the moral perfection of human beings as such.

Hobbes and Human Rights

Hobbes's Apostasy

Hobbes's apostasy from traditional philosophy of law is found in his rejection of man's rational nature as the foundation of a person's natural right. Instead of the things that are by nature under the control of his rational faculties, Hobbes identified as a man's rights those things over which he exerts controlling power of any kind, regardless of whether those things are other persons or not. In order to have a chance

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of Liberal Order (LaSalle, Ill.: Open Court, 1991); and Eric Mack, "Moral Individualism and Libertarian Theory," in *Liberty for the 21st Century*, ed. Tibor Machan and D.B. Rasmussen (London: Rowan & Littlefield, 1995). See also van Dun, *Het fundamenteel rechtsbeginsel*, for an early statement of this doctrine.

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of getting away with this radically subversive move, Hobbes had to redefine almost all of the terms pertaining to law and justice. More than two centuries would pass before his legalistic revisions, suitable as they were for legitimising the expansion of state power, became the norm. By the time the UD was drafted, the Hobbesian concept of right had virtually obliterated its classical predecessor. The form and content of the UD's human rights clearly prove that fact.

There is no need to detail Hobbes's theory except to recall his definition of man's natural right as the liberty to do everything he can—and Hobbes did mean everything—if he believes it to be useful for his self-preservation. As Hobbes himself pointed out, this natural right[24] implies the "Right to every thing; even to one another's body."[25] It is the "right" to rule the world for one's own benefit, even by killing, maiming, robbing, subjugating, or controlling others by whatever means available. In plain language, it is the "right" to commit any injustice that appears to further one's own interests—or, as Thomas Aquinas might have put it, a "right" to destroy society itself.

It is no mystery why Hobbes chose to build his theory on that paradoxical "right." He needed to justify his intended conclusion that political absolutism is the only way out of the war of all against all. War would inevitably ensue if everybody took that "right" seriously and tried to set himself up as the ruler of the world. From this, Hobbes concluded that peace is only possible when there is a single ruler with sufficient power to make resistance to his commands futile.

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[24]In referring to "*ius naturale,*" Hobbes was playing a trick on Grotius's rather unfortunate definition of *ius* as a moral faculty or moral power, in Hugo Grotius, *De jure belli ac pacis libri tres: in quibus jus natur & gentium item juris publici prcipua explicantur* (Amsterdami: Apud Guilielmum Blaeuw, 1631). According to Hobbes's conventionalist ideas, a "*ius naturale*" could only be a faculty or power that was not constrained by anything except another natural power (or "externall impediment," as he called it)—as if adding the qualifier *naturale* to *ius* was the same as removing the qualifier "moral" from "moral power." However, a *ius* is not a faculty or power. It is a bond specified by the terms of agreement among persons as to where they will draw the boundaries among themselves, as to how they will separate the "mine" from the "thine." As such, it is a moral constraint as to what they can do. Likewise, a *ius naturale* is a moral constraint, albeit one specified by the natural boundaries between any two persons. See note 14.

[25]Hobbes, *Leviathan*, XIV.

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If, as Hobbes wanted us to believe, there is no objective difference between justice and injustice, then reason is of no avail in choosing either one. The fundamental choice for man is not between just and unjust acts, but between unorganised or competitive injustice and organised or monopolised injustice. It is a choice between a life that is "brutish, nasty, and short" under the unorganised satisfaction of wants by competing powers, and a condition of "commodious living" when the satisfaction of wants is organised or controlled by a monopoly of power. Hobbes was confident that every sensible person would agree that a strong ruler or regime should monopolise "the right to everything." He was also confident that everyone's voluntary submission to such a regime was a dictate of reason.

Thus, political absolutism is justified as if by a contract in accordance with reason. Under this hypothetical contract, all subjects are supposed to identify completely with the regime, and to consider its every action as the execution of their own will.[26] The state, therefore, can never be a source of injustice, because "Whatsoever is done to a man, conformable to his own will signified to the doer, is not injury to him."[27] Hence, the state, by definition, is *just*. It is also a fictitious legal person—and so are its subjects, now called "citizens," who, having surrendered their natural independence, have become integral parts of the state and, therefore, unconditionally belong to it. A further consequence is that whatever belongs as "property" to any citizen ultimately belongs to the state, because without the state's power and protection, there would be no property.[28] In any case, considerations of justice in the state must be based exclusively on its legal system, not on any natural law or the natural rights of natural persons.

The philosophical basis for this remarkable theory is Hobbes's view of man. Far from holding the traditional view of man as a natural person, a physical, finite, rational being with objective boundaries, Hobbes held that the physical or natural aspect of man was not relevant for the definition of his natural rights. What was relevant was the alleged

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[26] Hobbes, *Leviathan*, part I, chap. 16

[27] Hobbes, *Leviathan*, XV.

[28] Hobbes, *Leviathan*, part II, chap. 29: "Every man has indeed a Propriety that excludes the Right of every other Subject; And he has it onely from the Soveraign Power."

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fact that man has unlimited desires, especially an unlimited desire for power "that ceaseth only in Death."[29] In short, man is not what he is and does, but what he desires to be and to do. His "right" is not his life, liberty, or property, but the satisfaction of his desires.[30]

This interpretation of the "natural right" of human beings is the fundamental subversive element in Hobbes's theory. It would not show its full effects until a couple of centuries after Hobbes wrote *Leviathan*. Nevertheless, it should be clear that, from the beginning, it implied an eminently "economic" interpretation of the state as the essential organisation for the satisfaction of human wants and desires.

Hobbes was undoubtedly preoccupied with strictly political questions concerning the distribution of power. Nevertheless, he was well aware that, for the sake of a stable regime, some sort of welfare state would be required.

> And whereas many men, by accident inevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for . . . by the Lawes of the Commonwealth. . . . But for such as have strong bodies . . . : they are to be forced to work; and to avoid the excuse of not finding employment, there ought to be such Lawes, as may encourage . . . Navigation, Agriculture, Fishing, and all manner of Manufacture that requires labour.[31]

A Hobbesian Legacy

Until the end of the nineteenth century, Hobbes's theory was little more than a curiosity in the history of ideas. At that time, though, it resurfaced as a "rational foundation" for the omnipotent state, a state which many intellectuals praised as an instrument of progress. Moreover, the celebration of war in all its forms—between classes, races, nations, religions, ideologies, cultures, new and old elites, even biological species—returned Hobbes's metaphor of universal war to

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[29]Hobbes, *Leviathan,* part I, chap. 10.

[30]As Giovanni Pico della Mirandola, that archetypal Renaissance intellectual, wrote: "To [man] it is given to have what he wishes, to be what he wants." See Giovanni Pico della Mirandola, *De hominis dignitate, Heptaplus, De ente et uno, e scritti vari*, ed. Eugenie Garin (Florence: Vallecchi, 1942), p. 106.

[31]Hobbes, *Leviathan*, part II, chap. 30.

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the core of political thought. At the same time, the republican notion of popular sovereignty, with its stress on "the will of the people" (as manifested by the majority), began to displace the old idea of the rule of law.

Already in the late nineteenth century, Rudolph von Jhering promoted a utilitarian conception of the state—a conception that owed as much to Hobbes as to Bentham—as the basis for a new socio-political approach to jurisprudence.[32] In the United States, Roscoe Pound did much the same thing. This sociological dimension originated in the idea that social conflicts are rooted in subjective factors (desires, needs, wants, interests). Thus, resolution of such conflicts has to be at the level of those factors, rather than at the level of interpersonal relations as defined by objective natural rights. Pound concluded that there was a need for a sociological jurisprudence that focused on a new conception of justice. It would no longer refer to safeguarding the social order of free and equal persons by means of rules of law. Instead, it would require political legislators and administrators to produce a condition of "social justice" by means of "social engineering." This condition would be characterised by "the satisfaction of every-body's wants so far as they are not outweighed by the wants of others."[33] Pound was well aware of the incompatibility of "social justice" with justice as such. The former, he noted, "is repugnant to the spirit of the common law." It would require a return to a regime of status in which

> rights belong and duties attach to a person of full age and natural capacity because of the position he occupies in society or the occupation in which he is engaged. . . . When the standard is equality of freedom of action, all classes . . . are repugnant to the idea of justice. When the standard is equality in the satisfaction of wants, such classification and such return in part to the idea of status are inevitable.[34]

Pound may not have predicted the present explosion of "special rights" for all sorts of classes, groups, and categories, but he would not

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[32]See Rudolph von Jhering *Der Zweck im Recht* (Leipzig : Breitkopf & Hartel, 1893–98); and also in Rudolph von Jhering, *Der Kampf um's Recht* (Wien: Manz, 1872).

[33]Roscoe Pound, "Need of a Sociological Jurisprudence," *Green Bag* 19 (1907), p. 612.

[34]Pound, "Need of a Sociological Jurisprudence," p. 615.

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have been overly surprised by it either. As he well knew, social justice and the "rights" it implies are about little else than classification, grouping, and categorisation.

Pound's view, though, was only a partial conversion to Hobbesian subjectivism. To him, the common law remained within the domain of justice. However, this domain was reduced to what remained after "social legislation" attempted a "socially acceptable economy of the satisfaction of everybody's wants." Where they were legally recognised, wants, desires, and interests would supersede natural rights—which is to say that they first had to become "rights" with a higher legal standing than natural rights.

Legal realists, who did not accept Pound's separation of law from political legislation, were far more radical converts. In their view, judges should be social engineers who used whatever power was at their disposal to enforce social justice. Judges should not be intimidated by "the ideology of property" or by "traditional justice." They should not shy away from intervening as rulers in the affairs of businesses, institutions, associations, and families.

In his discussion of monopoly grants (to railroads and other utilities), American jurist Brooks Adams announced a principle that legal realists would subsequently apply to the institution of private ownership, as well as to all rights of property and contract attached to it:

> When the law confers upon any man or class of men an exclusive privilege to fix upon some object which is a matter of necessity *or even of desire* to others, it . . . subjects the purchaser to a servitude.[35]

Arguing that the rights of ownership and property are "exclusive" rights, realists concluded, in Hobbesian fashion, that all were monopolies granted by the political power of the state. There is no such thing as "natural property"; property is always a creature of legislation. The realists also accepted Adams's argument that servitude is a condition of unsatisfied or frustrated need or desire. They used it to indict private property as the single most important threat to "social justice." After all, to claim as property for oneself something that another needed or desired was the height of injustice, because, in doing so, one violated

[35]Brooks Adams, "Law Under Inequality: Monopoly," in *Centralization and the Law*, ed. M. Bigelow (Boston: Little, Brown, 1906), emphasis added.

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the other's fundamental right to full satisfaction, his right to be free from want and frustration.

The sociological turn in jurisprudence, beginning in the late nineteenth century and culminating between the world wars, was, in fact, a return to Hobbes's subjectivist redefinition of "the natural right of man." Hobbes had laid the foundations for the revolution in thinking about law and politics that finally erupted in an age of rampant authoritarianism and Big Government. One cannot begin to understand the human rights of the UD without taking that revolution into account.

As we have seen by way of the thought experiment conducted above, the idea that people should act on their own initiative in trying to secure their right to the satisfaction of their wants can only lead to one of the familiar Hobbesian outcomes: universal war or the concentration of political power. The logic of this argument is clearly visible in the structure of the UD. In order to keep human rights from creating universal war, one should "socialise" and transform them into mere reflections of governmental duty. The state should administer human rights in accordance with the organisation and resources of the country. This requires a continuous weighing of interests and desires as well as a vast apparatus of politicians, bureaucrats, experts, and agents to gather data, concoct and interpret the statistics essential to policy-making, and implement the policies selected. All of this is inevitable because the things which the human rights are "rights to" are inevitably scarce.

Unlike a person's natural rights, which recognise his standing as a producer or guardian of scarce resources, his human rights are claims to whatever might serve to satisfy his "dignity," i.e., his covetousness. In the final analysis, they all translate into a right to the labour and productive services of the great multitude of nameless others who find themselves under the same government. Each person's human right is a "right" to tax and regulate others—a right that, to deprive it of its lethal character, must be taken from him and administered by a powerful central authority. Social justice—that is to say, taking human rights seriously—means statistics and political resource management.[36] It

[36]Statistical criteria of social justice have been skillfully used by a number of feminists complaining about the "under-representation" of women in politics and other high-profile occupations. Spokespersons for a few other groups have followed their example.

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implies that a "right" can have no more than a rhetorical significance until it is made into a legal privilege by effective policy:

> Benefits in the form of a service have this . . . characteristic that the rights of the citizen cannot be precisely defined. The qualitative element is too great. . . . It follows that individual rights must be subordinated to national plans.[37]

Politics trumps rights. T.H. Marshall's words were not meant to criticise the concepts of social justice and human rights, but to illustrate how wholeheartedly their advocates have swallowed the political hook together with the subjectivist bait of the Hobbesian philosophy of "right."

Concluding Remarks

Unlike Crombag, I do not see human rights as "sympathetic, but naive." Instead, I see them as a sophisticated elaboration of the peculiar Hobbesian view that a human being is not some definite, finite, physical, "moral agent," but merely an indefinite bundle of desires seeking satisfaction by all means available. Thus, a human being's fundamental or natural right is not the physical integrity of his own being and works, but the satisfaction of his desires.

Unfortunately, if human beings tried to satisfy their desires through individual initiative by all means available, war and destruction would result. For that reason—so the theory implies—they should choose to relinquish control over their own lives so that their desires might be satisfied for them according to the priorities, policies, and "national plans" of a single authority. In this way, according to the theory, their desires can be satisfied more efficiently by all means available. Of course, the desires that will be satisfied are no longer their own, but only those that have been transformed by means of statistics into suitable policy goals.

Of course, none of this is without cost. If an army, as Robert Heinlein wrote, is "a permanent organisation for the destruction of life and property," then the modern state, with its myriad of privileged public and private institutions, is a permanent organisation for the

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[37]T.H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950), pp. 58–59.

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separation of persons from their own life and property. Human beings themselves, to the extent that they are not members of the policymaking elite, must be treated as "national resources" in order for the state to realise their human rights. As such, they are to be managed in the endeavour to equalise the satisfaction of wants in accordance with the organisation and resources of the state that claims authority over them.

This is a sophisticated and, in its own way, fascinating view of human beings and their rights, but I have no sympathy for it. I cannot believe that covetousness, not the rational nature of man, is the distinguishing mark of "human dignity." To believe that is to accept that one's rights are as unlimited as one's desires, and, thus, are the primary sources of conflict and disorder. No such belief is found anywhere in the classical tradition of law and rights. Human rights are not a legacy of the tradition's representative theories of, say, Thomas Aquinas or John Locke. The UD's human rights are at odds with any view that takes human beings—and not just their desires—seriously. Social justice is not a species of justice; it is as different from justice as equalising the satisfaction of wants is different from ordering interpersonal relations in accordance with freedom and equality.

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THE AMERICAN MILITIA AND THE ORIGIN OF CONSCRIPTION: A REASSESSMENT

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Author's Introduction: I originally completed this article in 1986, but it appeared only in an obscure, now-defunct (I believe) libertarian publication, *Rampart Individualist* 4 (Summer 1988). I have long intended to revise it for some more prominent forum, but have never found the time. I offer it again, with only slight stylistic revision, because of the recent publication of Michael A. Bellesiles's controversial book, *Arming America: The Origins of a National Gun Culture*.[1] Bellesiles's most arresting claim, and the one for which he has drawn the most criticism, is that very few Americans owned firearms prior to the Civil War. In reaching this conclusion, Bellesiles makes some equally dubious assertions about the insignificance and incompetence of the American militia of the era. His denigration flies in the face of what military historians, whatever their ideological inclinations, have long known about the pervasive historical role and operations of the militia. Thus, I present this article as a mild corrective. If I were to revise it, I would primarily take notice of many of the relevant books and articles that have appeared in the intervening fifteen years. But very few of the scholarly gaps in the literature I identified then have yet been fully filled, and almost none of my overall conclusions require the slightest modification.

According to established mythology, American citizens were not conscripted until the Civil War. First the Confederacy and then the Union resorted to the draft to fill their depleting armies. Prior to that, this mythology holds, no draft existed in the United States. The U.S. government fought the American Revolution, the War of 1812, and the Mexican War solely with volunteers. Toward the end of the War of 1812, the Madison administration did call for conscription, but this

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[1]Michael A. Bellesiles, *Arming America: The Origins of a National Gun Culture* (New York: Alfred A. Knopf, 2000).

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request failed due to Daniel Webster's stirring and frequently reprinted denunciation of the draft on the floor of Congress.[2]

Unfortunately, this halcyon portrait is false in nearly every respect. The only U.S. war fought without conscripts before the Civil War was the Mexican War. American governments, state or national, drafted men not only to fight the Revolution and the War of 1812, but also to wage Indian wars and to suppress the Whiskey Rebellion. Because they employed decentralized militia drafts, however, this fact has often escaped notice. Military experts privy to the compulsory nature of the militia and the implications of such arcane phrases as "calling forth the militia" have failed to communicate their knowledge to outsiders. Indeed, the militia's coercive elements lasted until they were discontinued during the Jacksonian era.[3]

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[2]As reputable and able an authority on conscription as Martin Anderson, who served on President Reagan's Military Manpower Task Force, appears to hold to aspects of this mythology. His works on the subject include a bibliography he compiled with Valerie Bloom—*Conscription: A Select and Annotated Bibliography* (Stanford, Calif.: Hoover Institution Press, 1967)—plus two collections he edited: *The Military Draft: Selected Readings on Conscription* (Stanford, Calif.: Hoover Institution Press, 1982), with Barbara Honegger; and *Registration and the Draft: Proceedings of the Hoover-Rochester Conference on the All-Volunteer Force* (Stanford, Calif.: Hoover Institution Press, 1982). Although Anderson has not written personally on conscription's history, he included on the inside covers of *The Military Draft* a historical chart which conforms to this mythology. From the same volume, his editorial introduction to William G. Carleton's "Raising Armies Before the Civil War," pp. 67–78, evinces a similar historical view. Incidentally, although Anderson selected this article to survey American conscription during the pre-Civil War period, it really says very little about that subject, being actually concerned with the question of regulars versus federal volunteers, two different types of voluntarily recruited soldiers. See n. 28 below.

[3]The scholarly literature could very fruitfully accommodate another history of the American militia and another history of conscription in the United States. The most recent account of the origin and development of state military forces is John K. Mahon, *History of the Militia and the National Guard* (New York: Macmillan, 1983). It offers the most complete enumeration available of instances in which a militia draft was employed, but overall, unfortunately, it is not quite up to the standards of thoroughness set by its companion volumes in the Macmillan Wars of the United States series, or by the author's previous work.

Still less helpful are the two older histories of the militia: William H. Riker, *Soldiers of the States: The Role of the National Guard in American*

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Democracy (Washington, D.C.: Public Affairs Press, 1957); and Jim Dan Hill, *The Minute Man in Peace and War: A History of the National Guard* (Harrisburg, Penn.: Stackpole, 1964). Riker's book offers interesting statistics, but it is brief, and it slights the volunteer militia. Hill's book, on the other hand, takes a narrative approach that emphasizes the volunteer militia, but devotes only one of its twenty-one chapters to the pre-Civil War period. Likewise, Eileen Galloway, *History of United States Military Policy on Reserve Forces, 1775–1957*, Paper No. 17, prepared for the House Armed Services Committee, 85th Cong., 1st sess., 1957, can only be cursory in its mere fifty-seven pages.

Although a collection of documents, John O'Sullivan and Allan M. Meckler, ed., *The Draft and Its Enemies: A Documentary History* (Urbana: University of Illinois Press, 1974), provides in its textual introduction and notes the best—indeed, nearly the only—general history of conscription in the United States. It incorporates more fully than any other work on the subject an awareness of the militia's coercive nature. A neglected but extremely well-informed summary that covers this topic through the end of the Civil War is William L. Shaw, "Conscription by the State through the Time of the Civil War," *Judge Advocate Journal*, no. 34 (October 1962), pp. 1–40. Also helpful as to the history of the draft, despite having little on the militia, are two articles by Cotton M. Lindsay, "Our National Tradition of Conscription: The Early Years" and "Our National Tradition of Conscription: Experience with the Draft," in *Why the Draft? The Case for a Volunteer Army*, ed. James C. Miller, III (Baltimore: Penguin, 1968), pp. 107–45.

Much sketchier is John L. Rafuse, "United States' Experience with Volunteer and Conscript Forces," in *Studies Prepared for the President's Commission on an All-Volunteer Armed Force* (Washington, D.C.: U.S. Government Printing Office, 1970), vol. 2. Joseph C. Duggan's published dissertation, *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service* (Washington, D.C.: Catholic University of America Press, 1964), is weak on the antebellum period. John Remington Graham, *A Constitutional History of the Military Draft* (Minneapolis: Ross & Hainers, 1971), is a brief but reliable overview, despite its partisan objection to conscription's constitutionality. Jack Franklin Leach, *Conscription in the United States: Historical Background* (Rutland, Vermont: Charles E. Tuttle, 1952), really only covers the efforts for conscription at the national level during the War of 1812 and the Civil War.

Marvin A. Kreidberg and Merton G. Henry, *History of Military Mobilization in the United States Army, 1775–1945* (Washington, D.C.: Department of the Army, 1955), surveys the history of U.S. manpower mobilization in general. A magisterial work from the Macmillan Wars of the United States series that places the history of U.S. conscription into a broad context is Russell F. Weigley, *History of the United States Army* (New York: Macmillan, 1967).

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THE COLONIAL PERIOD AND THE AMERICAN REVOLUTION

The militia system was originally transplanted to the American colonies from England.[4] At the outset, it was grounded in the principle of universal obligation. Practices differed widely from colony to colony, but everywhere the militia had two coercive elements. First, it enrolled every able-bodied male between certain ages (usually sixteen to sixty), with only a few exemptions. Colonial governments required those enrolled to furnish their own arms (no small expense) and to muster for regularly scheduled training. Failure to do so resulted in fines. Initially, this mandatory training could be as frequent as once a week or more, but, as the Indian threat receded, most colonies reduced the number of training days to approximately four per year. The militia thereby provided a compulsory system of universal military training.

The second coercive element evolved when the militia was called forth for active military service. Only in dire emergency, and only for a short period, would a militia district deploy its enrolled manpower in toto. Normally, when a colonial government called upon its militia for a military campaign, it would set quotas for each district. The districts would then try to fill the quotas with volunteers, and sometimes the colonies would encourage volunteering with bounties. However, if volunteers were insufficient, the districts would then meet their quotas through drafts. Generally, the only legal ways of avoiding such militia drafts were by either paying a stiff fine or hiring a substitute. Thus, the threat of conscription lurked behind every resort to the seemingly innocuous power to call out the militia.

Enforcement of the militia's coercive elements was sometimes lax. Moreover, there were hallowed restrictions upon employment of the militia draft. Colonial governments were not supposed to send drafted militiamen outside the colony, and the draftee's term of service was usually limited to three months. Consequently, if colonial

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[4]On the English precursor to the American militia system, see Michael Powicke, *Military Obligation in Medieval England: A Study in Liberty and Duty* (Oxford: Clarendon Press, 1962); Lindsay Boynton, *The Elizabethan Militia, 1558–1638* (London: Routledge & Kegan Paul, 1967); and J.R. Western, *The English Militia in the Eighteenth Century: The Story of a Political Issue, 1660–1802* (London: Routledge & Kegan Paul, 1965).

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governments planned long, offensive military expeditions, they generally relied upon militia volunteers who specifically contracted for such expeditions. On occasion, some colonies even established quasi-standing military forces independent of the militia.

Colonial governments nonetheless made frequent recourse to militia drafts during the Indian wars and in imperial wars against France and Spain. If necessary, they passed special legislation obviating the militia draft's restrictions, or directly impressed men not from the militia rolls but from the lower strata of society, as was commonly done in Britain. In addition, the militia functioned as a standby local police force. (American cities did not establish their first professional forces of armed police until the 1850s.) The New England colonies merged the militia with the night watch while the Southern colonies assigned it the mission of slave patrolling. Governments in every locale depended on the militia to suppress insurrections. All such additional militia tasks imposed further compulsory duties upon the citizens.[5]

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[5]Colonial militias have been well studied. For overviews, see Herbert L. Osgood, *The American Colonies in the Seventeenth Century* (New York: Macmillan, 1904–07), vol. 1, pp. 496–527, vol. 2, pp. 375–400; Louis Morton, "The Origins of American Military Policy," *Military Affairs* 22 (Summer 1958), pp. 75–82, reprinted in Anderson, *The Military Draft*, pp. 47–58, as well as in *Military Analysis of the Revolutionary War: An Anthology of the Editors of* Military Affairs (Millwood, N.Y.: KTO Press, 1977), pp. 7–14; Daniel Boorstin, *The Americans: The Colonial Experience* (New York: Random House, 1958), pp. 343–72; John W. Shy, "A New Look at the Colonial Militia," *William and Mary Quarterly*, 3rd ser., 20 (April 1963), pp. 175–85, reprinted and slightly revised in *A People Numerous and Armed: Reflections on the Military Struggle for American Independence*, ed. John W. Shy (New York: Oxford University Press, 1976), pp. 21–33, and also reprinted in *The Military in America: From the Colonial Era to the Present*, ed. Peter Karsten (New York: Free Press, 1980), pp. 3–12; Douglas Edward Leach, *Arms for Empire: A Military History of the British Colonies in North America, 1607–1763* (New York: Macmillan, 1973), pp. 1–41; and Darrett B. Rutman, *A Militant New World, 1607–1640* (New York: Arno Press, 1979), a reprint of his 1959 Ph.D. dissertation for the University of Virginia.

These works, along with Mahon's *History of the Militia*, pp. 14–34, and Russell F. Weigley's *History of the United States Army* (New York: Macmillan, 1967), pp. 3–12, lead us to more specialized journal articles and dissertations which cover the militia of nearly every colony. Three especially noteworthy colony studies are David William Cole, "The Organization and Administration of the South Carolina Militia System, 1670–1783" (Ph.D. diss.,

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Within this fundamentally coercive system, a volunteer component did emerge. Alongside the *common* militia, just described, was what came to be called the *volunteer* militia, consisting of privately recruited military units. The earliest such unit was the Ancient and Honorable Artillery Company of Boston, organized in 1636 and still in existence. At first, these volunteer units were completely independent of the common militia. Later, colonial governments and successor state governments integrated them into the general militia systems. Volunteer units provided much of the cavalry, artillery, and elite infantry within the militia. Men could gain exemption from the common militia by joining a volunteer unit. But many of these units still remained private fraternities with exclusive memberships. Furthermore, the total number and aggregate size of such units remained relatively small for most of the eighteenth century.[6]

University of South Carolina, 1953); William L. Shea, *The Virginia Militia in the Seventeenth Century* (Baton Rouge: Louisiana State University Press, 1983); and Fred Anderson, *A People's Army: Massachusetts Soldiers and Society in the Seven Years' War* (Chapel Hill: University of North Carolina Press, 1984).

For a compilation of each of the various colonies' coercive militia enactments, see U.S. Selective Service System, *Backgrounds of Selective Service*, Special Monograph No. 1, vol. 2, *Military Obligation: The American Tradition* (Washington, D.C.: U.S. Government Printing Office, 1947). Although this compilation is very close to comprehensive, covering the years up to 1789 and consisting of fourteen parts, each a separate volume, Charles A. Lofgren, in "Compulsory Military Service Under the Constitution: The Original Understanding," *William and Mary Quarterly*, 3rd ser., 33 (January 1976), p. 78, n. 56, reports that the compilation omits some acts.

Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill: University of North Carolina Press, 1982), pp. 3–14, provides an excellent intellectual, as opposed to institutional, survey of the colonial militia tradition. Cress, however, exaggerates the extent to which eighteenth-century colonial reliance upon volunteer military expeditions represented a straying from that tradition.

The colonial militia's role in law enforcement could stand more scrutiny. David R. Johnson's *American Law Enforcement: A History* (St. Louis: Forum Press, 1981), pp. 1–16, summarizes what we know about colonial law enforcement, including the compulsory night watch, but does not develop the association with the colonial militia system.

[6]The formation of volunteer units is one aspect of the colonial militia that could stand further investigation. Because many such units began as officially chartered but private organizations, they can be traced only through

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Everything noted so far about the compulsory nature of the colonial common militia is well known. Less well known is the fact that the common militia persisted without serious alteration through the Revolution. As the colonies made the revolutionary transition to states, they refurbished their militias to better maintain order, fight the British, and suppress Tories. The new militia systems, however, incorporated both of the old system's coercive elements. Even before the Battles of Lexington and Concord, the colonies increased the number of required training days, tightened exemption lists, and stiffened fines. In Frederick County, Virginia, during the spring of 1775, for instance, the patriot committee increased the frequency of mandatory training days for every male between sixteen and sixty to one per month. Compulsory militia preparations of this sort were far more widespread than

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their own rare and scattered unit histories—when they can be traced at all. For instance, the definitive work on the Ancient and Honorable Artillery Company, originally named the "Military Company of Massachusetts," is Oliver A. Roberts, *History of the Military Company of Massachusetts Now Called the Ancient and Honorable Artillery Company of Massachusetts, 1637–1888*, 4 vols. (Boston: A. Mudge & Son, 1895–1901).

General treatments of the volunteer militia that only touch lightly upon its colonial origins are Frederick P. Todd, "Our National Guard: An Introduction to its History," *Military Affairs* 5 (Summer 1941), pp. 73–86; John K. Mahon, *The American Militia: Decade of Decision, 1789–1800* (Gainesville: University of Florida Press, 1960), pp. 56–61; and Marcus Cunliffe, *Soldiers and Civilians: The Martial Spirit in America, 1775–1865* (Boston: Little, Brown, 1968), pp. 213–54. Mahon uses the term "special militia" to differentiate between *independent* units formally outside the militia system, and *volunteer* units formally within it. He admits, however, that "the volunteer companies were more intimately related to the independent companies than to the standing [i.e., common] militia" (p. 60), and that "in the last decade of the eighteenth century the distinction between [independent and volunteer units] grew more and more hazy" (p. 61).

We should further note that because the militia system provided for two distinct routes for volunteering, further ambiguity can cloud understanding of the term. The description "volunteer" applied not only to members of standing independent and volunteer militia units, but also to war volunteers recruited from the common militia for particular expeditions or purposes. Thus, John O'Sullivan and Alan M. Meckler, in their discussion of the colonial militia in *The Draft and Its Enemies: A Documentary History* (Urbana: University of Illinois Press, 1974), p. 5, somewhat inappropriately use the designation "volunteer militia" to refer to both types of volunteers. Mahon, *History of the Militia*, pp. 31–32, helps clarify these terminological issues. For a later use of the term "volunteer," see n. 28 below.

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the famed contingents of minutemen, who volunteered to be ready at a moment's notice.[7]

When the states put active military forces into the field, they eventually fell back upon militia drafts. The Continental Army, the military force of the new national government, was initially composed entirely of volunteers. But, as the war dragged on, manpower shortages became acute, despite the monetary bounties and land grants

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[7]As John Shy observes in "Hearts and Minds in the American Revolution: The Case of 'Long Bill' Scott and Peterborough, New Hampshire," in *A People Numerous and Armed*, p. 174, the Revolutionary transformation of the militia "deserves more attention than it has had." Shy himself, by focusing on the Revolutionary militia's political role, emphasizes its discontinuity with the colonial militia. Don Higginbotham, in contrast, in "The American Militia: A Traditional Institution with Revolutionary Responsibilities," in *Reconsiderations of the Revolutionary War: Selected Essays*, ed. Don Higginbotham (Wesport, Conn: Greenwood Press, 1978), p. 84, concludes that the colonial militia "remained structurally much the same in the Revolution, although it was saddled with greater burdens and responsibilities than before." An examination of the actual Revolutionary militia laws in U.S. Selective Service System, *Backgrounds of Selective Service*, confirms the militia's coercive continuity.

A good discussion of the militia's Revolutionary transition, from an ideological rather than an institutional perspective, is contained in Cress, *Citizens in Arms*, pp. 53–74. The example of Frederick County, Virginia, comes from Don Higginbotham, *The War of American Independence: Military Attitudes, Policies, and Practices, 1763–1789* (New York: Macmillan, 1971), p. 10. See also Earl Milton Wheeler, "The Role of the North Carolina Militia in the Beginning of the American Revolution" (Ph.D. diss., Temple University, 1969), and his earlier article, "Development and Organization of the North Carolina Militia," *North Carolina Historical Review* 41 (July 1964), pp. 318–23.

One study that has started to fill the gap identified by Shy is Steven Rosswurm's "The Philadelphia Militia, 1775–1783: Active Duty and Active Radicalism," in *Arms and Independence: The Military Character of the American Revolution*, ed. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1984), pp. 75–118. Rosswurm's article, based on his dissertation, "Arms, Culture, and Class: The Philadelphia Militia and 'Lower Orders' in the American Revolution, 1765–1783" (Northern Illinois University, 1979), finds that the Philadelphia common militia, in addition to its other military and non-military roles, enforced price controls and was the conduit of radical political action. In contrast, Philadelphia's volunteer militia unit, the City Light Horse, was politically conservative, and the two actually squared off against each other in the "Fort Wilson" riot.

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offered by both the Continental Congress and the individual states. The Continental Army bid for recruits against the active forces of the thirteen state militias. Massachusetts began employing conscription in the early summer of 1776. New Hampshire followed in 1777, and most remaining states fell in line upon recommendation of Congress later that year. The states used these drafts not just to man their own forces but also to fill their quotas for the Continental Army.[8]

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[8]Revolutionary conscription has not received a single study of its own, an incredible deficiency in historical scholarship. Many general accounts of the Revolution omit any mention of drafts at all, perpetuating the popular impression that there were none. The most complete treatment of the subject is in Higginbotham's *The War of American Independence*, pp. 390–93. Other summaries can be found in Joseph C. Duggan, *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service* (Washington, D.C.: Catholic University of America Press, 1964), pp. xvii–xxi, 1–6: Marvin A. Kreidberg and Merton G. Henry, *History of Military Mobilization in the United States Army, 1775–1945* (Washington, D.C.: Department of the Army, 1955), pp. 14–15; O'Sullivan and Meckler, *The Draft and Its Enemies*, pp. 3–19; and Lofgren, "Compulsory Military Service Under the Constitution," 76–79.

Higginbotham's *The War of American Independence* is representative of the "new military history," which has vastly enriched Revolutionary War scholarship. The new military history transcends the traditional preoccupation with campaigns and battles to look more deeply at the interaction between the military and society. In the process, most such works on the Revolution at least mention conscription. A skillful synthesis of the new military history, James Kirby Martin and Mark Edward Lender's *A Respectable Army: The Military Origins of the Republic, 1763–1789* (Arlington Heights, Ill.: Harlan Davidson, 1982), esp. pp. 89–94, best sets Revolutionary conscription within a broader social and military framework. Another of these new works, Charles Royster's *A Revolutionary People at War: The Continental Army and American Character, 1775–1783* (Chapel Hill: University of North Carolina Press, 1979), offers some unsystematic but still valuable snippets on the drafts.

Older state studies of Revolutionary drafts include Jonathan Smith, "How Massachusetts Raised Her Troops in the Revolution," *Massachusetts Historical Society Proceedings* 55 (1921–22), pp. 345–70; Arthur J. Alexander, "Pennsylvania's Revolutionary Militia," *Pennsylvania Magazine of History and Biography* 69 (January 1945), pp. 15–25; and Arthur J. Alexander, "How Maryland Tried to Raise Her Continental Quotas," *Maryland Historical Magazine* 42 (September 1947), pp. 184–96. On North Carolina, see Wheeler, "The North Carolina Militia in the American Revolution," and "Development and Organization of the North Carolina Militia."

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Revolutionary conscription remained decentralized, varying from state to state. Some states used conventional militia drafts; others impressed vagrants and transients. In general, only single males were drafted for short terms, and they could avoid service through the traditional mechanisms of paying a fine or finding a substitute. Nevertheless, at least in some locations, the draft's compass was wide. A local study of Concord, Massachusetts, found that half the males under fifty received at least one draft notice during the war. Some notices went to women, and others even to the old and crippled.[9] In some counties

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A fine state study that falls within the new military history, Richard Buel, Jr., *Dear Liberty: Connecticut's Mobilization for the Revolutionary War* (Middleton, Conn.: Wesleyan University Press, 1980), covers Connecticut's draft extensively. An especially neglected work that examines the Revolutionary drafts in Pennsylvania and to a lesser extent in neighboring states from the standpoint of conscientious objectors is Richard K. MacMaster with Samuel L. Horst and Robert F. Ulle, *Conscience in Crisis: Mennonites and Other Peace Churches in America, 1739–1789* (Scottsdale, Penn.: Herald Press, 1979), pp. 213–353.

For the actual draft laws of the various states, see U.S. Selective Service System, *Backgrounds of Selective Service*. The Continental Congress passed three resolutions urging the states to fill their quotas in the Continental Army through conscription. The first, on April 17, 1777—see *Journals of the Continental Congress, 1774–1789* (Washington, D.C.: U.S. Government Printing Office, 1904–1937), vol. 7, pp. 262–63—suggested that the states first grant exemptions from being drafted into the active *state* forces to any two men who furnished one recruit for the Continental Army. Only if this failed to meet the quota should the states draft men directly into the Continental Army. The second such resolution, on February 26, 1778—see *JCC,* vol. 10, pp. 199–200—simply "required forthwith" the states to fill their quotas with draftees who would serve for nine months. The third resolution, on March 9, 1779—*JCC,* vol. 13, p. 229—"earnestly recommended" conscription without specifying a term of service.

The important distinction between conscripting men into the Continental Army and conscripting them into active state forces has so far received insufficient attention. Mahon, *History of the Militia*, p. 38, claims that the latter use of the militia was uncommon and illegal, but a perusal of U.S. Selective Service System, *Backgrounds of Selective Service,* indicates the opposite. Lofgren, "Compulsory Military Service under the Constitution," p. 77, n. 56, finds that Maryland was apparently the only state not to employ a draft to fill its Continental quota.

[9]Robert A. Gross, *The Minutemen and Their World* (New York: Hill and Wang, 1976), pp. 147–50.

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of Virginia, militia drafts provoked rioting. The worst, at Northumberland Court House in 1780, resulted in several deaths.[10]

Although no one seems to know the precise number of actual draftees serving in the Revolutionary forces, several studies have determined the relative number of hired substitutes. Within the active militias of Lancaster and Northampton Counties in Quaker Pennsylvania, 38 and 54 percent respectively of those serving were substitutes, while 20 to 40 percent of the New Jersey Line in the Continental Army were draft substitutes.[11] Some authorities have concluded from these high percentages that the draft laws were designed primarily to raise substitutes, and that in practice, very few conscriptees were forced to serve.[12]

Actually, the large number of hired substitutes implies that many others must have been conscripted outright. Unless militia drafts discriminated in operation, calling upon only those who could afford to hire substitutes, leaving everyone else exempt, men from the population of potential substitutes could not have avoided occasionally being drafted themselves. Once called, they could hardly have bought their way out. Thus, these percentages undoubtedly would be higher still if draftees who could not afford substitutes were included.

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[10]O'Sullivan and Meckler, *The Draft and Its Enemies*, pp. 8, 14–15, contains a brief review of resistance to Revolutionary conscription. MacMaster, *Conscience in Crisis*, pp. 213–353, has a great deal about resistance by pacifist churches.

[11]Arthur J. Alexander, "Service by Substitute in the Militia of Lancaster and Northampton Counties (Pennsylvania) during the War of the Revolution," *Military Affairs* 9 (Fall 1945), pp. 278–82; and Mark Edward Lender, "The Social Structure of the New Jersey Brigade: The Continental Line as an American Standing Army," in *The Military in America*, ed. Karsten, p. 33.

[12]For instance, John Shy, "American Society and Its War for Independence," in *Reconsiderations of the Revolutionary War,* ed. Higginbotham, p. 79, asserts that "In fact, down at the grass roots, men were almost never drafted." But Rosswurm, "The Philadelphia Militia, 1775–1783," pp. 101–2, indicates otherwise, at least in Pennsylvania—the one state that could be expected, because of its large Quaker population, to have the most porous draft system. The fact that those who refused a draft call were almost always fined rather than forcibly inducted might make it difficult to distinguish between those who answered a call voluntarily and those who answered it because they could not afford a substitute or fine. Yet, MacMaster, *Conscience in Crisis*, p. 293, cites instances in which conscientious objectors, rather than simply being fined or jailed, were forcibly inducted.

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Figures from the Civil War offer a crude way of estimating the possible Revolutionary ratio of actual draftees to draft substitutes, because the Union's 1863 draft law similarly allowed for hired substitutes and exemption fees. The first two calls garnered 13,297 draftees and 119,646 substitutes—approximately one draftee for every nine substitutes—with 84,966 paying the exemption fee.[13] Overall, 537,672 men entered the Union army during the period of these calls, most of them direct volunteers. Paid substitutes constituted only 22 percent of the total, a proportion at the lower end of those known for the Revolution. This would suggest that, at a minimum, actual draftees accounted for 2.5 percent of total Revolutionary troops—the same proportion as under the Union's first two calls.

During the Union's third call, the relative number of draftees increased to 26,205, as compared with 58,086 substitutes—almost one draftee for every two substitutes—and 1,298 exemptions. The exemption fee, however, had been abolished for all except conscientious objectors, driving up the price of substitutes. Overall, 272,463 men entered the Union army during this period, maintaining the proportion of substitutes at approximately the same level, 21 percent. But the proportion of draftees was now at nearly 10 percent, which gives a good upper-bound estimate for the Revolutionary period.

The Federalists and the Early National Period

With the winning of independence, the Continental Congress rejected George Washington's proposal for a peacetime standing army supported by a nationally uniform militia with universal conscription.[14]

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[13]William L. Shaw, "The Civil War Federal Conscription and Exemption System," *Judge Advocate Journal* 32 (February 1962), p. 16. These figures also appear in Eugene C. Murdock, *Patriotism Limited, 1862–1865: The Civil War Draft and the Bounty System* (Kent, Ohio: Kent State University Press, 1967), p. 13. Murdock, however, gives only the number of men who hired substitutes *after* being drafted. He inadvertently omits an even greater number of eligible men who gained exemption by hiring substitutes *prior to* the draft calls. If these substitutes are not counted, then the ratio of draftees to substitutes increases.

[14]Washington's "Sentiments on a Peace Establishment" is reprinted in *American Military Thought*, ed. Walter Millis (Indianapolis, Ind.: Bobbs-Merrill, 1966), pp. 16–28, and excerpted in O'Sullivan and Meckler, *The Draft and Its Enemies*, pp. 26–28. The most comprehensive work on U.S. military policy from the end of the Revolution through the Federalist ascendancy is Richard

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It discharged all of the Continental Army except for a remnant of eighty men and a few officers. As an alternative to a national army, the states retained full control over the militias. However, the common militia's compulsory nature remained intact. Hence, in 1786, when Virginia commissioned Revolutionary hero George Rogers Clark to lead a military campaign from what became Kentucky against the Indians, militiamen were drafted into his force, touching off widespread evasion, and then organized mutiny.[15]

Although Congress virtually disbanded the Continental Army, national acquisition of the Northwest Territory during the Revolution had shifted the burden of policing that area from the states to a national force of some kind. Consequently, the Continental Congress authorized in 1784 a small frontier constabulary to be raised voluntarily from the state militias for one year. (The Southwest Territory, as yet unceded by the states, got along without Congressional attention.) When the original enlistments expired in 1785, Congress converted this small force into a semi-standing army of regulars by authorizing new three-year recruits, without any direct reference to state militias. In 1786, in reaction to Shay's Rebellion in western Massachusetts, Congress voted to enlarge this frontier army from 700 to 2,000 men. Recruitment, however, failed to produce many additional soldiers.

Federalists such as Washington found these military arrangements unsatisfactory. They desired a national military strong enough to rival

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H. Kohn, *Eagle and Sword: Federalists and the Creation of the Military Establishment in America, 1783–1802* (New York: Free Press, 1975). See also Cress, *Citizens in Arms*, pp. 75–149, for the underlying ideological context. Don Higginbotham, "The Debate Over National Military Institutions: An Issue Slowly Resolved, 1775–1815," in *The American Revolution: Changing Perspectives*, ed. William M. Fowler, Jr. and Wallace Coyle (Boston: Northeastern University Press, 1979), pp. 149–68, surveys a slightly longer period in less detail.

[15]Temple Bodley, *George Rogers Clark: His Life and Public Service* (Boston: Houghton Mifflin, 1926), pp. 282–86. Most accounts of this Indian expedition mention the militia mutiny, but fail to mention the draft that caused it. See, for instance, Leonard C. Helderman, "The Northwest Expedition of George Rogers Clark, 1786–1787," *Mississippi Valley Historical Review* 25 (December 1938),pp. 317–34; or John Bakeless, *Background to Glory: The Life of George Rogers Clark* (Philadelphia: Lippincott, 1957), pp. 319–21. In fact, since Clark led the militia into the Northwest territory, beyond Virginia's borders at the time, in open contradiction of state law, the militia mutiny constituted a legally justified act of draft resistance.

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those of the European states and to quell domestic disturbances. They succeeded in putting their military ideas into the new Constitution. "Though the point has not often been noticed," Walter Millis wrote in his classic study of U.S. military policy, "the Constitution was as much a military as a political and economic charter."[16] It granted the central government unequivocal authority both to create a standing national military and to nationalize state militias.

Once the Constitution took effect, the Washington administration used trouble with Indians in the Northwest Territory to justify a national army that numbered nearly 4,000 regulars by 1795. Congress, however, hesitated to authorize a force of this size too precipitately, and actual recruiting lagged behind authorizations. Congress, therefore, delegated to the President the emergency power to call out the state militias for frontier defense.[17] Consequently, the national government,

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[16]Walter Millis, *Arms and Men: A Study in American Military History* (New York: G.P. Putnam's Sons, 1956), p. 47.

Interestingly enough, awareness of the militia's coercive nature has found its way into the legal literature debating whether the Constitution originally envisaged conscription. Indeed, those legal scholars who find modern conscription unconstitutional rest their claim upon the sharp distinction early Americans made between the militia and standing armies. The Constitution's guarded militia clauses, they concede, gave the new national government access to conscription, but only under highly restricted circumstances. The clauses that refer to an army were distinct, and authorized a military force that would consist exclusively of volunteers. In other words, the Constitution's militia clauses gave the national government one military force that could be raised through drafts but whose use was severely restricted, whereas the army clauses gave it a second military force that could be used for any purpose but whose raising was restricted.

The most objective examination of this question is Lofgren, "Compulsory Military Service Under the Constitution." Lofgren finds the evidence not totally conclusive, but the weight of it indicates that the Constitution did *not* grant the national government the power to draft men into the regular army. For the best of the somewhat polemic legal literature, see, on the pro-draft side, Michael J. Malbin, "Conscription, the Constitution, and the Framers: A Historical Analysis," *Fordham Law Review* 40 (May 1972), pp. 805–26; on the anti-draft side, see Leon Friedman, "Conscription and the Constitution: The Original Understanding," *Michigan Law Review* 67 (May 1969), pp. 1493–552, reprinted in Anderson, *The Military Draft*, pp. 231–96.

[17]An act of September 29, 1789, 1 *U.S. Statutes at Large* 95, gave the President a one-year authorization to call out the militia for frontier defense. It was the first Congressional grant of this power. An act of April 30, 1790, 1 *U.S.*

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when preparing its first Indian campaign under General Josiah Harmar in 1790, supplemented the regulars with 1,500 militia from Kentucky and Pennsylvania—most of them raised by state militia drafts. Both Harmar's expedition, three-fourths militia, and a subsequent mixed expedition under General Arthur St. Clair, went down to ignominious defeat at the hands of the Indians.

The Federalists did not finally subdue the Northwest tribes until 1794, after they had enlarged the standing army enough to mount an expedition consisting primarily of army regulars under General "Mad" Anthony Wayne. Ever since, Wayne's victory at the Battle of Fallen Timbers has been cited as proof of the militia's military inferiority. However, because most of the militia in the previous campaigns had been drafted, whereas the regulars were volunteers, his victory could as logically prove the inferiority of conscription. The fact that Wayne's command also included a significant contingent of Kentucky militia—but militia that were well-paid mounted volunteers rather than draftees—gives additional support to this alternate interpretation. Indeed, the frequent condemnations of the American militia by professional military officers, from Washington forward, assume a whole new meaning in light of the extensive resort to militia drafts during early U.S. history.[18]

Statutes at Large 119, made this authorization permanent. A section of the act of March 3, 1791, expanding the regular army, 1 *U.S. Statutes at Large* 222, extended this authorization to bring the army to full strength or provide it with cavalry.

[18]For the Harmar expedition, the national government called up 500 militia from Pennsylvania and 1,000 from Kentucky. Harmar eventually fielded 320 regulars and 1,133 militia. For the St. Clair expedition, the national government summoned 1,000 militia from Kentucky, but only 470 turned out. St. Clair also started out with 625 regulars and 1,674 six-month levies. (A hybrid between regulars and the militia, levies were volunteers who, like the militia, served only short terms but who, like the regulars, were recruited without reference to state governments.) Only about 1,400 of St. Clair's original force participated in his concluding campaign. Wayne's command at the Battle of Fallen Timbers comprised 2,000 regulars and 1,600 mounted volunteers from Kentucky. The militia in the first two campaigns were not only drafted, but were paid a mere $3 per month while in national service, as compared with the mounted volunteers, who received $20 per month. Even allowing for the additional expense of providing mounts, this represented a considerable discrepancy. The mounted volunteers were *not* part of the Kentucky militia's standing volunteer units, but were recruited and organized specifically for the campaign.

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At the same time the Federalists created a standing army, they also attempted to consolidate control over the state militias. Henry Knox, President Washington's Secretary of War, submitted to Congress a plan for national training and supervision of the militia. At the heart of Knox's plan was a scheme for classifying the state militias on the basis of age. The "advanced corps" of those aged eighteen to twenty would receive ten to thirty extra days of federal training per year, much like modern reservists and members of the National Guard, except that membership would be mandatory for every male in the age bracket. Service in the advanced corps would, in fact, become a prerequisite for citizenship. The advanced corps could then be continuously ready for immediate mobilization.[19]

The fullest discussions of the use of militia draftees on the Harmer and St. Clair expeditions, as well as the use of mounted volunteers on the Wayne expedition, are Richard G. Stone, Jr., *The Brittle Sword: The Kentucky Militia, 1776–1912* (Lexington: University Press of Kentucky, 1977), pp. 22–30; and John K. Mahon, "The Citizen Soldier in National Defense, 1789–1815" (Ph.D. diss., University of California at Los Angeles, 1950), pp. 19–52, 93–101. Kohn's account in *Eagle and Sword*, pp. 91–127, 141–57, also alludes to these militia drafts, and reports that Wayne at one point almost resorted to such a draft. Otherwise, as in the case of the Clark expedition discussed in note 15 above, most accounts of the Federalist Indian expeditions overlook the militia drafts. See especially the standard military account of these campaigns, James Ripley Jacobs, *Beginnings of the U.S. Army, 1783–1812* (Princeton, N.J.: Princeton University Press, 1947), pp. 40–188.

[19]Knox's militia plan is reprinted in O'Sullivan and Meckler, *The Draft and Its Enemies*, pp. 28–36. Kohn, *Eagle and Sword*, pp. 128–38, suggests that the Washington administration deliberately made the plan unacceptable to Congress to undermine the militia system and build support for a standing army. He repeats this thesis more strongly in "The Murder of the Militia System in the Aftermath of the American Revolution," in *Military History of the American Revolution: The Proceedings of the 6th Military History Symposium, United States Air Force Academy, 10–11 October 1974*, ed. Stanley J. Underdal (Washington, D.C.: U.S. Government Printing Office, 1976), pp. 110–26.

Higginbotham, "The Debate Over National Military Institutions," p. 159, is skeptical of Kohn's thesis. Along with the difficulties Higginbotham mentions, the similarity of the Knox plan to later Republican proposals for militia overhaul, as noted later in the text, renders Kohn's speculation extremely doubtful. In fact, the vote against the Knox plan crossed over the emerging partisan lines. More significant factors in the Knox plan's defeat appear to have been its high cost—$400,000 annually for the advanced corps alone—and the protests by Quakers.

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Congress rejected most of Knox's plan, but, under the pressure of St. Clair's devastating defeat—the worst for U.S. arms until Custer's last stand at Little Big Horn—it did pass the Uniform Militia Act of 1792. Although military historians have tended to denigrate this act because it failed to go as far as Knox wished, the Uniform Militia Act firmly etched into national statute the principle of universal military obligation. It required the enrollment of every free, white, able-bodied male citizen between eighteen and forty-five (with some exemptions, to which the states could add) in the militia of his state. Each citizen was to equip himself at his own expense. In response to this act, all fifteen states enacted new militia laws, each of which reaffirmed the state government's power to conscript.[20]

A second Congressional measure that passed at the same time, the Calling Forth Act, specified the general conditions under which state militias could be called into national service. In a clause all but ignored by historians, the Act instituted heavy fines for failure to report when drafted for national service. Just as when responding to state calls, each militia district had a quota to be filled first by volunteers and then by draftees. Because the Act still left the actual drafting to the states, fines became the dual responsibility of both levels of government. State militia courts-martial would assess fines, and

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[20]The Uniform Militia Act (May 8, 1792) is 1 *U.S. Statutes at Large* 271. It is also reprinted in full in Millis, *American Military Thought*, pp. 62–67, and in part in O'Sullivan and Meckler, *The Draft and its Enemies*, pp. 36–39. The register of military historians dismissing this act begins with Major General Emory Upton, *The Military Policy of the United States* (Washington, D.C.: U.S. Government Printing Office, 1917), pp. 82–85. Among others, in addition to Kohn, are Cunliffe, *Soldiers and Civilians*, pp. 179–86; Kreidberg and Henry, *History of Military Mobilization*, pp. 30–31; Millis, *Arms and Men*, pp. 50–52; O'Sullivan and Meckler, *The Draft and Its Enemies,* pp. 22–23; Rafuse, "United States' Experience with Volunteer and Conscript Forces," p. 7; Riker, *Soldiers of the States*, pp. 18–22; Harry M. Ward, *The Department of War, 1781–1795* (Pittsburgh, Penn.: University of Pittsburgh Press, 1962), p. 143; and Weigley, *History of the United States Army*, pp. 93–94. Only Mahon, in his outstanding and singular monograph on how state militias actually operated during the Federalist era, *The American Militia: Decade of Decision*, pp. 14–24 ff., has bothered to examine the impact of this act upon state legislation. Mahon's monograph is based on his important but neglected dissertation, "The Citizen Soldier in National Defense, 1789–1815," which covers a longer period, and some of his unique insights have also found their way into his *History of the Militia*, pp. 51–62.

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the national government would collect them.[21]

The Federalist State first found use for its new militia legislation in 1794, when it smashed the Whiskey Tax rebellion in western Pennsylvania. For this demonstration, Washington called up from four state militias no fewer than 12,950 men—more than he had usually commanded during the Revolution. Militia drafts proved necessary to raise this overwhelming force, and hostility to these drafts sparked further disturbances in eastern Pennsylvania, Virginia, and Maryland.[22]

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[21]The Calling Forth Act (May 2, 1792) is 1 *U.S. Statutes at Large* 264. Sometimes the Calling Forth Act and the Uniform Militia Act are treated as one, and they both—together or separately—are often referred to as the Militia Act of 1792. Among military historians, again only Mahon, *The American Militia: Decade of Decision*, pp. 21, 26–27, has noted the penalties for draft resistance within the Calling Forth Act. A striking example of the prevailing historical oversight with regard to the act's penalties is provided by Millis, *American Military Thought*, pp. 61–62. Millis reprints the first part of the Act, but omits later sections, beginning with sec. 5, the very one that provides penalties for draft resistance.

[22]Considering the huge amount of historical attention that the Whiskey Rebellion has received, it is surprising that the necessity for militia drafts in its suppression was not widely noted until the publication of Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York: Oxford University Press, 1986), pp. 210–14. Slaughter estimates that the number of conscripts within the ranks of the so-called Watermelon Army was startlingly high, varying between 75 and 100 percent. These estimates exclude, however, the volunteer militia units that constituted an almost distinct operational component of the Watermelon Army.

Previous accounts of the Whiskey Rebellion that touch upon conscription include William Findley, *History of the Insurrection in the Four Western Counties of Pennsylvania in the Year 1794* (Philadelphia: S.H. Smith, 1796), pp. 140–68; Leland Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* (Pittsburgh, Penn.: University of Pittsburgh Press, 1939), pp. 221–23; Robert W. Coakely, "Federal Use of Militia and the National Guard in Civil Disturbances: The Whiskey Rebellion to Little Rock," in *Bayonets in the Streets: The Use of Troops in Civil Disturbances*, ed. Robin Higham (Lawrence: University Press of Kansas, 1969), pp. 19–20; and Mahon, "The Citizen Soldier in National Defense," pp. 109–14. Hostility to the draft was so strong in Pennsylvania that the state government eventually offered bounties and pay raises—in addition to the standard federal pay for militia in federal service—to entice militia volunteers.

After Washington had called out the militia, Congress passed a special act on November 29, 1794, 1 *U.S. Statutes at Large* 403, giving the President

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With this experience behind them, the Federalists in 1795 slightly modified the Calling Forth Act to eliminate some of its procedural safeguards against putting the militia under national control.[23]

Liberal provisions of various states for exemptions and substitutes made the conscription inherent in the two national militia acts far from universal. Historians have therefore tended to view these acts as minor and inconsequential. Even Arthur Ekirch, who is a thoroughgoing anti-militarist, holds that the Uniform Militia Act

> added little to the *nominal* service traditionally required of the citizen militia in England and American colonies. . . . [T]he militia duty of the early days of the republic bore slight resemblance to the type of military service actually exacted later in the United States under the conscription and selective service laws.[24]

Because militia service could be avoided by paying a fine or hiring a substitute, some economic historians have treated compulsory militia duty as a mere tax-in-kind infrequently substituting for what should be considered a monetary tax.[25]

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the power to station a force of 2,500 militia in the four western counties of Pennsylvania for up to three months.

[23]Act of February 28, 1795, 1 *U.S. Statutes at Large* 424. The revised Calling Forth Act eliminated, with respect to the President's power to call forth the militia to enforce national laws, the requirement for a judicial certificate and the limitation as to time. Some commentators have mistakenly concluded that the revised act was *more* restrictive. This results from confusing the section applying to the suppression of insurrection within states with the section applying to enforcement of national laws. The militia's use in the former case required the application of the state legislature or executive. This restriction was in both acts and was not extended to the enforcement of national laws by eliminating the requirement for a judicial certificate in the revised act.

Prior to revising the Calling Forth Act, Congress had passed an act on June 5, 1794, 1 *U.S. Statutes at Large* 381, allowing use of the militia for enforcing neutrality laws.

[24]Arthur A. Ekirch, Jr., *The Civilian and the Military: A History of the American Antimilitarist Tradition* (New York: Longmans, Green, 1955), pp. 34, 47, emphasis added.

[25]Rafuse takes this approach in "United States' Experience with Volunteer and Conscript Forces," p. 11, in reference not to the actual militia drafts of this period, but to the far more comprehensive national conscription proposals of the War of 1812. He asserts that if any of the proposals had passed, "it

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There is no doubt that America's militia drafts of the late eighteenth and early nineteenth centuries could not match twentieth-century drafts in effectiveness and ruthlessness. Exemptions, fines, and substitutes clearly made conscription less onerous. Yet, the Civil War drafts of both Union and Confederacy started out with exemption fees and substitutes, and no one has ever argued that these were not true drafts. Even if viewed as a tax, militia fines and substitutes were a regressive one. In addition, research by John Mahon indicates that, in amount, the fines were far from nominal. The authorities could seize and sell all of a man's property to satisfy these fines. And, as this was a period in which imprisonment for unpaid debts—especially unpaid debts to the government—was standard, prison was, in fact, the ultimate penalty for evading militia service. As Mahon concludes, "militia duty had to be taken into account directly by one-tenth of the entire population, or, counting families of militiamen, by two-fifths. No other governmental relationship except taxpaying touched so many individuals."[26]

In the early national period, both national and state governments turned frequently to the common militia. After the Whiskey Rebellion,

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would have been closer to an all-volunteer force than either today's draft or the French Revolutionary *levee on* [sic] *masse*." "Never before or since in American history has such a total recognition of the tax aspect of the draft been coupled with so complete an attempt to tax everyone according to ability to pay, personal inclinations, and minimal exemptions." Cotton M. Lindsay, "Our National Tradition of Conscription: The Early Years," in *Why the Draft? The Case for a Volunteer Army*, ed. James C. Miller, III (Baltimore: Penguin, 1968), pp. 121–23, contains similar observations, but confines them precisely to the single War of 1812 proposal to which they are truly applicable, the Troup Bill. See the discussion of the War of 1812 in the text.

To his credit, Rafuse is one of the few draft historians who realizes that *if* conscription is employed, the much-maligned practice of hiring substitutes actually makes it *more* efficient and equitable, not less. Moreover, militia drafts admittedly did have one superiority over the use of regulars. Since the militia system was decentralized, it tended to impose the costs of military action and law enforcement only upon the residents of the area concerned, in those cases in which the condition was localized. Thus, during the Federalist Indian campaigns, the use of the militia forced the frontier to bear the costs of suppressing Indians, whereas the use of regulars coercively spread these costs to the rest of the country.

[26]Mahon, *The American Militia: Decade of Decision*, p. 66. On pp. 47–48, Mahon examines the severity of militia fines, as he also does in *History of the Militia*, pp. 59–60. See also Lena Londen, "The Militia Fine, 1830–1860," *Military Affairs* 15 (Fall 1951), pp. 133–44.

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the national government not only called up the militia to put down resistance to other national laws,[27] but also passed at every foreign crisis special acts ordering the states to prepare militia detachments for instant mobilization.[28] States called out the militia on their own

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[27]The Washington administration, in addition to employing the militia in the Indian campaigns and the Whiskey Rebellion, induced seaboard governors to enforce Washington's Neutrality Proclamation, the 1794 Neutrality Act, and the 1794 embargo with their militias. Federalist President John Adams called out the militia to crush the Fries tax rebellion in eastern Pennsylvania during the Quasi-War with France in 1799. President Jefferson called upon the militia to forestall possible insurrection in the newly acquired Louisiana Territory in 1803, to suppress the alleged Burr Conspiracy in 1806, to defend the coast after the *Chesapeake-Leopard* affair in 1807, and (see n. 30) to enforce the embargo of 1808–9. The Madison administration had occasion to put the militia in federal service in the Michigan Territory and along the Canadian border. More importantly, it alerted militia during its annexation of west Florida in 1810, and put militia into action against Indians in the Battle of Tippecanoe in 1811. Mahon, "The Citizen Soldier in National Defense," pp. 123–24, 133–34, 247–51, mentions all these national recourses to the militia prior to the War of 1812, although he does not reveal to what extent any of them involved conscription.

For additional details on domestic uses of militia by the national government, see Coakely, "Federal Use of Militia and the National Guard in Civil Disturbances," pp. 13–25; Bennett Milton Rich, *The Presidents and Civil Disorder* (Washington, D.C.: Brookings Institution, 1941), pp. 2–34; and Frederic T. Wilson, *Federal Aid in Domestic Disturbances, 1787–1903*, 77th Cong., 2nd sess., 1903, Senate Doc. 209, pp. 33–54. Unlike in the Whiskey Rebellion, the national government also deployed regulars in conjunction with the militia in the Fries Rebellion, in the Burr Conspiracy, and in the enforcement of Jefferson's embargo. Although the Federalists had included in an act on March 2, 1799, 1 *U.S. Statutes at Large* 725, an authorization for such use of federal volunteers, there was no similar specific statutory authorization for regulars until Jefferson, ironically, secured passage of an act on March 8, 1807, 2 *U.S. Statutes at Large* 443, allowing the use of regulars "in all cases . . . where it is lawful for the President of the United States to call forth the militia."

[28]With the stirring of international troubles in 1794, the first Detachment Act passed, requiring the states to ready a detachment of 80,000 militia for national call. This act represented a Jeffersonian Republican effort to head off the Federalist move to create an army reserve—or, as it was then referred to, a Provisional Army—directly responsive to the national government, exactly as the U.S. has today. A summary list of these various Detachment Acts, revived at every subsequent international crisis, follows:

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9 May 1794	1 *Statutes* 367	80,000 militia
24 Jun 1797	1 *Statutes* 522	80,000 militia
3 Mar 1803	2 *Statutes* 241	80,000 militia
18 Apr 1806	2 *Statutes* 383	100,000 militia
30 Mar 1808	2 *Statutes* 478	100,000 militia
10 Apr 1812	2 *Statutes* 705	100,000 militia

These acts were all very similar. (For slight differences in the maximum term of national service that they set for the militia, see note 31.)

Even with passage of the Detachment Acts, the Federalists still got a Provisional Army Act, in May 1798, at the outset of the Quasi-War. This act was notable not only for authorizing a Provisional Army of 10,000, but also for allowing the national government directly to enlist volunteer militia units for terms of up to three years. It thus built upon the precedent of recruiting six-month levies during the St. Clair expedition to further develop a hybrid category between regulars and militia.

The Republicans feared that the act was a sinister attempt to undermine state control over the militia system, but after the *Chesapeake-Leopard* affair in 1807, Jefferson himself secured the authority to recruit 30,000 one-year volunteers. The major difference between this Republican measure and the previous Federalist one was that the Federalists had empowered the President to appoint the officers in volunteer units, while the Republicans left this to the states. By the War of 1812, the new category of state-organized federal volunteers was well established. A summary of the acts responsible for this new component follows:

3 Mar 1791	1 *Statutes* 222	2,000 levies
28 May 1798	1 *Statutes* 558	10,000 Provisional Army + volunteers
24 Feb 1807	2 *Statutes* 419	30,000 volunteers
6 Feb 1812	2 *Statutes* 676	50,000 volunteers
27 Jan 1815	2 *Statutes* 193	40,000 state troops + 40,000 volunteers

During the War of 1812, the Republicans amended the call for 50,000 volunteers with an act on July 6, 1812, 2 *U.S. Statutes at Large* 785, which returned to the Federalist system of having the President appoint the officers of volunteer units. Later, on January 29, 1813, 2 *U.S. Statutes at Large* 794, the Republicans tried to abandon the volunteer category altogether and instead rely totally upon regulars and the militia. However, after the failure of the Madison administration's proposals for national conscription, the act of January 27, 1815, listed above (and discussed in the section of the text dealing with the War of 1812) reinstated the category. In the Mexican War, volunteers became the national government's primary alternative to regulars.

This innovation added still another meaning to the term "volunteer." The connection between federal volunteers and the volunteer militia was

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(although sometimes with national reimbursement) to battle Indians on the Southwest frontier, enforce national neutrality laws and trade embargoes, stand guard over the coast, capture criminals and fugitive slaves, control city riots, enforce quarantines, and perform various other chores.[29] If conscription was not actually implemented in all these instances, it was at least always legally imminent.

THE REPUBLICANS AND THE WAR OF 1812

When the Jeffersonian Republicans came to power in 1801, they proceeded to dismantle the Federalist State. In particular, they slashed expenditures on the army and navy. However, this made their attachment to the coercive militia system even more pronounced than that of the Federalists. Whatever its alleged dangers, the national standing army that the Federalists created was composed entirely of volunteers. Thomas Jefferson, however, denounced this dependence upon "pauper hirelings." He spoke of the "necessity of obliging every citizen to be a soldier." "We must train and classify the whole of our male citizens," he wrote, "and make military instruction a regular part of collegiate

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close, but not total. Pre-existing volunteer militia units sometimes comprised the federal volunteers, and the acts of 1798 and 1807 had greatly stimulated the establishment of such standing units. Often, however, units of federal volunteers were created *ad hoc* out of recruits from the common militia, and would disband upon discharge. Finally, it must be remembered that the regulars, too, were voluntarily enlisted. Despite their long-nurtured mutual antipathy, the only real difference between federal volunteers and regulars, once organized and in service, was that volunteers had shorter terms.

[29]The most thorough discussions of the militia's employment by state governments during the early national period are Mahon, *The American Militia: Decade of Decision*, pp. 47–55, and "The Citizen Soldier in National Defense," pp. 73–92, 135–88, 213–32. The national government's practice of encouraging states to use their militias by providing financial reimbursement was common, but few historians have looked into it. The campaigns against the Indians of the Southwest territory in particular merit additional research. The national government's war against the Northwest Indians has received all the fanfare because the regulars were involved and Indian resistance was more serious, but the national government also financed a simultaneous "war" against the Southwest tribes, conducted covertly through state and territorial militias. It would be nice to know to what extent, if any, militia drafts were implemented during these operations. This question is not addressed in Ward, *The Department of War*, pp. 154–66, which is almost the only study that discusses national involvement in these campaigns.

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education."[30]

President Jefferson and his Republican successor, James Madison, desiring a classification scheme similar to Knox's rejected plan,

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[30]As quoted by Sidney Forman, "Thomas Jefferson on Universal Military Training," *Military Affairs* 11 (Fall 1947), p. 178. The Forman article is reprinted in Editors of *Military Affairs*, *Military Analysis of the Revolutionary War*, pp. 55–56. Jefferson made these statements in a letter to James Monroe during the War of 1812, but they accurately reflect his earlier ideas.

Unfortunately, there is no single study of Republican military policy to complement Kohn's *Eagle and Sword* on Federalist military policy. The best substitute is Cress, *Citizens in Arms*, pp. 150–77, an excellent treatment more of Republican military attitudes than of Republican military policies. Additional details on policy are found throughout J.C.A. Stagg's *Mr. Madison's War: Politics, Diplomacy, and Warfare in the Early American Republic, 1783–1830* (Princeton, N.J.: Princeton University Press, 1983), which is the first modern study of the War of 1812 truly to integrate the diplomatic, military, and domestic aspects of that conflict, and to fit them into the general Republican outlook. Although Mahon's *American Militia: Decade of Decision* does not extend into the Jeffersonian era, his dissertation, "The Citizen Soldier in National Defense, 1789–1815," pp. 213–465, does, offering much valuable information on the militia—at both the state and national level—unavailable elsewhere.

Jefferson's attachment to the coercive militia system is just one indication that his reputation for anti-militarism is somewhat inflated. Indeed, his administration made several other compromises with military "necessity":

(1) Jefferson left on the books the Alien Enemy Act, the one of the four Federalist Alien and Sedition Acts that allowed for wartime internment (and which was unearthed and used with telling effect by President Wilson during World War I);

(2) Jefferson's administration oversaw the founding of the U.S. Military Academy at West Point, as well as the Army Corps of Engineers, both of which dovetailed with Jefferson's penchant for State education; and

(3) Jefferson gained the first statutory authorization for using regulars in law enforcement (see note 27).

As Marcus Cunliffe has pointed out in his seminal discussion of U.S. military culture through the Civil War, *Soldiers and Civilians*, pp. 1–27, American attitudes toward the military have historically consisted of not two, but three distinct perspectives: (1) the professional military tradition, favoring conventional standing armies; (2) the anti-professional militia tradition, favoring citizen soldiers; and (3) the pacifist tradition, opposing all military expedients. The Jeffersonian Republicans fall within the second tradition, which is too often not distinguished carefully enough from the third, because, at the national level, they shared a fear of standing armies.

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repeatedly called for militia reorganization. In effect, they hoped to conscript a massive reserve of citizen soldiers, as was done in Switzerland. Throughout this period, whenever the idea of militia classification was resurrected, it was simply a code that, in modern terminology, meant a national system of universal military training.

Congress proved as indifferent to Jefferson's classification scheme as it had been to Knox's. The only concrete steps it took toward militia reorganization were: (1) in 1803, to require annual militia reports from each state's adjutant general; (2) to lengthen intermittently the militia's maximum term, when called into national service, from three to six months; and (3) to pass an 1808 measure appropriating $200,000 annually to help arm state militias. (The appropriation was the first grant-in-aid in U.S. history. The original bill was introduced, ironically, by John Randolph of Roanoke, a stalwart Republican opponent of centralization. It called for a much larger annual amount.) Jefferson also secured the power to use state militias in the routine, day-to-day imposition of his hated and widely resisted embargo.[31]

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[31]An act on March 2, 1803, 2 *U.S. Statutes at Large* 207, set the requirement for annual militia returns. Although the Uniform Militia Act of 1792 had required each state's adjutant general to send to the national government duplicates of the annual militia returns made for the state government, the new act required uniform returns to be compiled directly for the national government. The Republican administrations were also much more adamant about collecting such returns.

The Detachment Acts (see note 28) of April 18, 1806, March 30, 1808, and April 10, 1812, 2 *U.S. Statutes at Large* 383, 478, 705, set the militia's term, if called into national service, at six months. All three acts expired after two years. In contrast, the first two Federalist Detachment Acts (1794 and 1797) provided three-month terms, the same as in the Calling Forth Act. The first Republican Detachment Act of March 3, 1803, 2 *U.S. Statutes at Large* 241, was ambiguous. It stated no specific term for the militia, while establishing a one-year term for any volunteer units that states provided in lieu of common militia.

An act of April 23, 1808, 2 *U.S. Statutes at Large* 490, established the annual appropriation for militia arms. Randolph wanted $1 million appropriated annually. Earlier, during the war crisis with France, an act of July 6, 1798, 1 *U.S. Statutes at Large* 576, permitted states to purchase arms for the militia from the national arsenals, and Congress had passed various acts allowing the sale or loan of national arms to militia and volunteer units while they were in national service.

The Second Enforcement Act (January 7, 1809), 2 *U.S. Statutes at Large* 506, empowered the President to use the army, navy, and militia to enforce

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Subsequently, during the War of 1812, when volunteers yielded only enough manpower to raise the regular army to slightly more than half its authorized strength of 63,000, James Monroe, Madison's Secretary of War, proposed conscripting an army of 100,000. Monroe offered two possible ways of doing this: either the national government could draft men into the regular army for two years, or it could classify and directly draft the militia into national service for two years without going through state governments. Monroe's second conscription plan was similar to what Jefferson and Madison had in mind all along.[32]

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the embargo without the stipulation—which appears in the first and second Calling Forth Acts—that resistance to national laws must be too powerful for ordinary procedures of the courts and marshals to handle. The Act also allowed the President to delegate this broad power to others. It aroused such a storm of protest that it was instrumental in bringing about the total repeal of the embargo two months later. For further details on this Act and on Jefferson's use of the militia to enforce the embargo, see Leonard D. White, *The Jeffersonians: A Study in Administrative History, 1801–1829* (New York: Macmillan, 1951), pp. 460–68; Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side*, rev. ed. (New York: Quandrangle, 1973), pp. 107–20, 137–41; and Rich, *The Presidents and Civil Disorder*, pp. 31–37.

The Jefferson administration was also responsible for a fifth, minor, militia innovation. An act of March 3, 1803, 2 *U.S. Statutes at Large* 215, established the common militia in the District of Columbia.

[32]The most complete discussion of the proposal for national conscription during the War of 1812 is the first section of Jack Franklin Leach's *Conscription in the United States: Historical Background* (Rutland, Vermont: Charles E. Tuttle, 1952). Fortunately, Leach's heavy-handed, pro-conscription bias does not outweigh the richness of his account. Other good discussions include Edward J. Harden, *The Life of George M. Troup* (Savannah, Ga.: E.J. Purse, 1859), pp. 141–55; Kreidberg and Henry, *History of Military Mobilization*, pp. 47–56; Lindsay, "Our National Tradition of Conscription: The Early Years," pp. 114–23; O'Sullivan and Meckler, *The Draft and Its Enemies*, pp. 24–25, 40–52; Rafuse, "United States' Experience with Volunteer and Conscript Forces," pp. 8–13; and Stagg, *Mr. Madison's War*, pp. 453–68. Nearly all of these works at least hint at the existence of state conscription during the war, but none gives even a summary discussion of the matter.

Some authors, following Upton, *The Military Policy of the United States*, p. 137, report that 65,032 regulars (including 5,000 in the navy and the marines) served during the War of 1812. These forces did not all serve simultaneously, however. According to the *Historical Statistics of the United States from Colonial Times to 1970* (Washington, D.C.: U.S. Government Printing Office, 1975), vol. 2, p. 1142, regulars never exceeded 39,000 in total strength at any one time.

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Because the war ended before *national* conscription could pass, this has left the mistaken impression that the U.S. fought the War of 1812 without conscription altogether. On the contrary, state governments continuously relied upon drafts to raise more than 200,000 soldiers who served in the militia at various moments and for various durations. Sometimes states drafted the militia in response to national calls, in which case they generally adhered to the "Rules with Regard to Militia Draughts" set forth in official army regulations of May 1, 1813. At other times, states drafted the militia to meet their own military needs. Many of the Maryland militia who failed to defend the U.S. capital at the battle of Bladensburg, to give just one example, were conscripts.[33]

A third plan that Monroe suggested, in the event that Congress refused to consider national conscription in any form, confirms the

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[33]The number of militia who served during the War of 1812 is difficult to ascertain. Upton's *The Military Policy of the United States*, p. 137, reports a total of nearly 450,000. However, this total not only includes troops who served at different times, but also duplications for the same individual being called into militia service more than once. *Historical Statistics*, vol. 2, p. 1135, estimates that a total of 286,730 different individuals served in state and U.S. forces during the War of 1812. Subtracting from that total the number of regulars and federal volunteers who served produces an estimate of 200,000. This conforms with the estimates in Weigley, *History of the United States Army*, p. 121. Also consult Hill, *The Minute Man in Peace and War*, pp. 14–16.

The Rules and Regulations of the Army for May 1, 1813, relating to militia drafts are *American State Papers: Military Affairs*, vol. 1, pp. 425–38. For drafted militia at the Battle of Bladensburg, see Hill, *The Minute Man in Peace and War*, pp. 12–14, and Mahon, "The Citizen Soldier in National Defense," pp. 420–35. It is interesting to note that the national government called for 5,000 militia from Pennsylvania before this battle, but the state replied that, because of a legislative lapse, it was temporarily unable to employ conscription. Only a meager number of Pennsylvania volunteers showed up for the battle.

Considerable confusion surrounded the legal length of the term of national service for drafted militiamen during the War of 1812. Militiamen often claimed that they were summoned under the Calling Forth Act for a three-month term, while the Madison administration claimed they were summoned under the 1812 Detachment Act (see note 32), for a six-month term. This dispute reached its most serious point when General Andrew Jackson, in February 1815, court-martialed and executed six militiamen who had the temerity to challenge too vociferously his decision about the length of their terms.

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importance of these militia drafts. Men who could provide another to volunteer for the regular army would receive exemptions from state militia service. Congress eventually instituted this alternative method of bringing U.S. forces up to 100,000. Obviously, such exemptions would have been valueless if militia drafts had been rare or nonexistent.[34]

Indeed, Monroe went so far as to argue that his first proposal, for conscription into the regular army, would be less coercive than the militia system itself.

> The organization of the militia is an act of public authority, not a voluntary association. The service required must be performed by all, under penalties, which delinquents pay. . . .
>
> The [conscription] plan proposed is not more compulsive than the militia service, while it is free from most of the objections to it. The militia service calls from home, for long terms, whole districts of the country. None can elude the call. Few can avoid the service; and those who do are compelled to pay great sums for substitutes.[35]

Overall, for evading national service during the War of 1812, militia courts-martial fined nearly 10,000 men a total of $500,000. Still others ignored purely state calls; New York, for example, assessed an additional $200,000 against 4,000 militia resistors. These numbers strikingly belie the common impression that militia drafts were nominal and unimportant. Only the awkward administrative dualism that divided responsibility between the state and national governments, coupled with increasing popular opposition to the militia, prevented

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[34]Act of December 10, 1814, 3 *U.S. Statutes at Large* 146. Monroe's original plan called for five militia exemptions per regular volunteer, but the final act provided only one. It also incorporated Monroe's fourth proposal, an increase in incentives for volunteering. The Federalists had earlier used national militia exemptions—in an amendment to the Provisional Army Act (June 22, 1798) 1 *U.S. Statutes at Large* 569—to stimulate formation of volunteer units. The Republicans, in contrast, did not grant volunteer units *national* exemptions from militia duty until the units were actually called into national service.

[35]As quoted in O'Sullivan and Meckler, *The Draft and Its Enemies*, p. 43. Monroe's recommendations are also reprinted in Anderson, *The Military Draft*, pp. 503–13. We should note that Monroe's second conscription plan, in addition to calling for a national militia draft, would have proscribed the prevailing practice of allowing drafted militiamen to hire substitutes.

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the full collection of national fines after the war had ceased. New York apparently collected the entire $200,000, but only at a monetary cost that exceeded that amount by $25,000.[36]

In other words, the issue that Daniel Webster so eloquently debated on the floor of the House of Representatives was not whether there should be conscription at all, but, rather, who should do the conscripting, states or the national government.[37] The measures before Congress at the time were the Giles Bill, which had passed in the Senate, and the Troup Bill, which had been introduced in the House. The Giles Bill was a modified version of Monroe's second conscription proposal, setting up a national system of militia classification and conscription to raise a force of 80,000 that would serve for two years. The Troup Bill modified Monroe's first proposal, classified the population, and set quotas for the regular army, but did not authorize a draft. Instead, each class would meet its quota through taxes, proportional to wealth, that would be sufficiently high to pay for volunteers. Thus, the Troup Bill would have established a kind of primitive decentralized income tax to finance a volunteer army. It was an alternative to conscription that the militias of some states had tried during the Revolution.

The House eventually passed its own version of the Giles Bill, but since the two houses could not resolve their differences, they instead passed in January of 1815 an act allowing the national government to accept up to 40,000 special troops organized by the states, plus any privately organized volunteer units that offered themselves,

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[36]White, *The Jeffersonians*, pp. 536–39, contains the only discussion that I have come across of the national fines arising out of militia drafts. Mahon's *History of the Militia*, p. 81, mentions the additional New York state fines. Congress passed an act on February 2, 1813, 2 *U.S. Statutes at Large* 797, and a further special wartime measure on April 18, 1814, 3 *U.S. Statutes at Large* 134, both of which elaborated on the procedures for collecting the fines established in the Calling Forth Act. On the travail of the Quakers in their efforts to avoid militia conscription during the War of 1812, see Peter Brock's monumental *Pacifism in the United States: From the Colonial Era to the First World War* (Princeton, N.J.: Princeton University Press, 1968), pp. 339–42.

[37]Webster's speech was not published until *The Letters of Daniel Webster: From Documents Owned Principally by the New Hampshire Historical Society*, ed. C.H. Van Tyne (New York: McClure, Phillips, 1902), pp. 56–68. It is reprint-ed in Anderson, *The Military Draft*, pp. 633–45, and O'Sullivan and Meckler, *The Draft and Its Enemies*, pp. 44–49.

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to serve for one year, with the total force not to exceed 80,000. Eight states, with New York at the fore, began creating special state forces. This usually involved modifying militia laws by adding a more effective system of state classification and conscription. Peace came, however, before these forces became fully operational, and the act of January 1815 was repealed.[38]

This preoccupation with the centralization—as opposed to the extent—of power had already arisen in the war's most rancorous and fateful militia controversy. The governors of Massachusetts and Connecticut and the legislature of Rhode Island had refused at various times to furnish their state militias for national service, while a newly elected governor of Vermont had ordered his state militia to return home in the midst of a military campaign. Not until 1827 did the U.S. Supreme Court, in *Martin v. Mott*, finally settle this jurisdictional controversy by endorsing unchecked Presidential discretion in calling state militias into national service.[39]

Less often cited, but equally significant, was the Supreme Court decision in *Houston v. Moore* seven years earlier. This virtually unknown militia case actually yielded the first Court ruling on conscription. It involved a Pennsylvania man who had been drafted into the militia during the War of 1812 in response to a Presidential call. When he evaded the draft, a Pennsylvania court fined him under the national Calling Forth Act. The draft resistor challenged the constitutionality of his punishment, arguing that because he had been drafted in response to a Presidential call, only a federal court could fine him. In effect, he denied that Congress had either the authority or the intention to establish a concurrent administration for militia drafts, in which the state governments assessed fines that the national government collected. The Court, however, disagreed and upheld the fine.[40]

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[38]Act of January 27, 1815, 3 *U.S. Statutes at Large* 193.

[39]Henry Wheaton, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States, 1816–1827* (Philadelphia: Matthew Carey, 1816–1827), vol. 12, pp. 19–40. Nearly every account of the War of 1812 refers to the controversy over calling out the New England militia, but for a concise summary, see White, *The Jeffersonians*, pp. 539–45. Massachusetts disavowed its action in 1824 in order to receive financial reimbursement from the national government for its wartime militia operations.

[40]Wheaton, *Reports of Cases Argued*, vol. 5, pp. 1–76. The obvious reason that legal scholars and historians have virtually ignored this case is that it applied only to the militia and said nothing either way about the national government's authority to draft men into the regular army.

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FROM THE WAR OF 1812 TO THE CIVIL WAR

Meanwhile, nearly every subsequent President continued to suggest militia reorganization in his annual messages. President Martin Van Buren's Secretary of War, Joel R. Poinsett, made the last serious effort to nationalize the state militias in 1840.[41] But all these suggestions died from lack of interest. The national government relied for the most part upon a small regular army. Still, during the Second Seminole War (1835–1842)—the first protracted counter-insurgency campaign by the U.S.—large numbers of militia from various states supplemented the regulars, and some of them from the Florida territory itself were drafted.[42]

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[41]Mahon, *History of the Militia*, p. 79, reports that between 1816 and 1835 the various Presidents requested militia reorganization from Congress no fewer than thirty-one times. For Congressional initiatives toward militia reorganization in the post-War of 1812 period, see Edgar Bruce Wesley, *Guarding the Frontier: A Study of Frontier Defense from 1815 to 1825* (Minneapolis: University of Minnesota Press, 1935), pp. 94–96.

Poinsett's militia plan is treated in Cunliffe, *Soldiers and Civilians*, pp. 197–99, as well as in J. Fred Rippy, *Joel R. Poinsett: Versatile American* (Durham, N.C.: Duke University Press, 1935), pp. 175–77; James C. Curtis, *The Fox at Bay: Martin Van Buren and the Presidency, 1837–1841* (Lexington: University Press of Kentucky, 1970), pp. 199–201; and Major L. Wilson, *The Presidency of Martin Van Buren* (Lawrence: University Press of Kansas, 1984), pp. 188–89. The Whigs turned Poinsett's militia plan politically against Van Buren to great effect during the 1840 Presidential race.

Sometimes the term "militia reform" has been applied to these efforts to strengthen and centralize the common militia's coercive features. The term, however, also refers to contrary movements at the state level, discussed below, to voluntarize the militia. For the sake of clarity, I have confined "militia reform" exclusively to the latter movement, and used the term "militia reorganization" to denote the nationalizing efforts.

[42]To fight the Second Seminole War, the national government first called up the militia of the Florida territory and neighboring states. Later, in an act of May 23, 1836, 5 *U.S. Statutes at Large* 32, Congress authorized 10,000 six- or twelve-month federal volunteers. It is not clear whether the territorial government of Florida initiated its militia draft in response to the national call or on its own. See John K. Mahon, *History of the Second Seminole War, 1835–1842* (Gainesville: University of Florida Press, 1967), pp. 139–40, 242; and George C. Bittle, "The Organized Florida Militia from 1821 to 1920" (Ph.D. diss., Florida State University, 1965), passim.

Although the national government appears to have placed relatively greater reliance upon the regulars after the War of 1812, there is no satisfactory

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Although the state governments continued to depend heavily upon their militias throughout the post-War of 1812 period, the entire militia system by this time was coming under sustained criticism at the

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catalog of all national mobilizations of state militias between the War of 1812 and Civil War with which to confirm this observation systematically. Much less is there an exploration of whether such mobilizations involved militia drafts. Partial listings are in Mahon, *History of the Militia*, pp. 86–96; Coakley, "Federal Use of Militia and National Guard in Civil Disturbances," pp. 25–26; and Rich, *The Presidents and Civil Disorder*, pp. 38–71. The most comprehensive compilation is Wilson, *Federal Aid in Domestic Disturbances,* pp. 55–106.

The national government supplemented regulars with militia to fight Indians not only in the Second Seminole War but also in the First Seminole War (1817–18) and the Black Hawk War (1831–12). During the somewhat misleadingly named First Seminole War, in which U.S. forces invaded Spanish Florida, General Andrew Jackson, on his own authority, raised more than 1,000 federal volunteers from Tennessee and Kentucky, appointing their officers himself and ignoring the state governments. A Senate investigating committee later reprimanded him for this irregularity. A contingent of Georgia militia that had been properly called into national service also participated in this campaign, and it may or may not have been drafted by the state. Militia participating in the Black Hawk War seems to have been confined to mounted volunteers.

Regulars imposed national authority without support of federalized militia (although militia under state control may have been present) during the slave revolts of 1831, the Bleeding Kansas episode (1856–58), the Mormon War (1857), and the Harpers Ferry Raid (1859). Small detachments of federalized militia assisted regulars in the Sabine border intrusion into Mexico (1836), in enforcement of neutrality during the Patriot insurrection in Canada (1837–38), in removal of the Cherokee Indians (1838), and in enforcement of the fugitive slave laws (early 1850s). Probably none of these latter uses resulted in conscription. During the bloodless Aroostook War on the Canada-Maine border, Congress passed an act on March 3, 1839, 5 *U.S. Statutes at Large* 355, authorizing the President to call out the militia for six months and to enlist 50,000 federal volunteers for six- to twelve-month terms, but President Van Buren did not put the act to use.

Purely state calls upon the militia, while certainly more numerous, are even less well recounted. The two most significant were by South Carolina during the Nullification Crisis (1832) and by Maine during the Aroostook War (1838–39). The South Carolina call involved only volunteers, and I have been unable to find any indication either way about the Maine call. State militias were also involved in the Buckshot War in Pennsylvania (1838) and the Dorr Rebellion in Rhode Island (1842).

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state level. Launching these political attacks was a collage of radical Jacksonians, peace advocates, and moralistic reformers. The Workingmen's Party in New York, precursor of the laissez-faire "Locofoco" Jacksonians, condemned militia fines because they fell unfairly upon laborers and the poor. The common militia also became the butt of an effective campaign of ridicule and civil disobedience. Men would muster for mandatory training with cornstalks, brooms, or other silly substitutes for weapons, giving rise to the derisive sobriquet "cornstalk militia." In some locations, disgruntled militiamen would elect the town drunk their commander. As a result of these attacks, the compulsory features of the common militia began to ease.

Delaware became the first state to repeal some of its militia fines as early as 1816, and, in 1831, it abolished the common militia system altogether. Massachusetts eliminated all compulsory militia service in 1840, followed by Maine, Ohio, and Vermont in 1844, Connecticut and New York in 1846, Missouri in 1847, and New Hampshire in 1851. New Jersey eliminated imprisonment for failure to pay a militia fine in 1844, followed by Iowa in 1846, Michigan in 1850, and California in 1856. In several states, fines were no longer enforced, or became truly nominal. Mandatory training days were already less frequent, and had degenerated into more social than military events.[43]

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[43]Practically the only study of the militia reform movement is Londen, "The Militia Fine." Other sources, such as Paul T. Smith, "Militia in the United States from 1846 to 1860," *Indiana Magazine of History* 15 (March 1919), pp. 20–47; Cunliffe, *Soldiers and Civilians*, pp. 186–92, 205–12; Mahon, *History of the Militia*, pp. 83–84; and Riker, *Soldiers of the States,* pp. 26–35, briefly recount the decline in the common militia or the legal changes at the state level that the militia reform movement brought about, but none look at this movement's actual ideology or composition, which deserves greater attention.

On the continuing Quaker campaign of civil disobedience against the common militia, see Brock, *Pacifism in the United States*, pp. 342–50. The opposition of the New York Workingmen's Party to compulsory militia duty is mentioned in Walter Hugins, *Jacksonian Democracy and the Working Class: A Study of the New York Workingmen's Movement, 1829–1837* (Stanford, Calif.: Stanford University Press, 1960), pp. 138–39. This radical Jacksonian advocacy of militia reform is consistent with Londen's observation that opposition to militia fines and to debt imprisonment were closely united, since the radical Jacksonian Democrats also supported the elimination of the latter.

However, this observation conflicts with the findings of Herbert Ershkowitz and William G. Shade in "Consensus or Conflict? Political Behavior

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Only in the South were the compulsory features of the militia maintained, probably because of their vital connection with slave patrols.[44]

A remarkable growth in the volunteer militia was concomitant with this decline in the common militia. Expanding steadily since the Revolution, the number of volunteer units exploded during the Jacksonian period. Three hundred sprang up in California between 1849 and 1856. One out of every twenty-nine people in the District of Columbia belonged to a volunteer company. With this burgeoning mass appeal, the volunteer militia was no longer the preserve of a wealthy elite. As Russell Weigley noted in his eminent history of the U.S. Army, units such as "[t]he New England Guards of Boston, the 7th Regiment of New York 'National Guards,' the First Troop of the Philadelphia City Cavalry, the Light Infantry Blues of Richmond, [and] the Washington Artillery of New Orleans" were popular and colorful "fixtures

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in the State Legislatures During the Jacksonian Era," *Journal of American History* 58 (December 1971), pp. 591–621, reprinted in *The Many-Faceted Jacksonian Era: New Interpretations*, ed. Edward Pessen (Westport, Conn.: Greenwood Press, 1977), pp. 212–41. Based on a quantitative voting analysis of four state legislatures, Ershkowitz and Shade find that while Democrats supported debt reform more strongly than did Whigs, militia reform crossed party lines.

[44]The relationship between the common militia and the compulsory slave patrol in the South is difficult to pin down because little has been written about the latter. Among the most illuminating exceptions are John Anthony Scott, "Segregation: A Fundamental Aspect of Southern Race Relations, 1800–1860," *Journal of the Early Republic* 4 (Winter 1984), pp. 421–42, and John Hope Franklin, *The Militant South, 1800–1861* (Cambridge, Mass.: Belknap, 1956), pp. 72–76. Franklin, on pp. 171–92, also discusses the Southern militia system.

When scholars do consider the slave patrol, they are understandably more concerned with its impact on the slaves than on free whites. Nonetheless, this scholarly gap is doubly unfortunate, because the compulsory slave patrol was one way that slave owners socialized the costs of maintaining the slave system, thereby distorting the economic calculation of those costs and transferring them to non-owners. The operation of the compulsory slave patrol thus has enormous implications for the controversies about slavery's economic efficiency.

George Fitzhugh, a perceptive arch-apologist for slavery, was acutely aware of this critical relationship. In *Sociology for the South: Or the Failure of Free Society* (Richmond, Virg.: A Morris, 1854), pp. 144–45, he proclaimed: "The poor . . . constitute our militia and our police. They protect men in the possession of property, as in other countries; and do much more, they secure men in possession of a kind of property which could not hold a day but for the supervision and protection of the poor."

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of the American scene." Even in the South, the volunteer militia came to supplant the common militia in size and importance.[45]

The supplanting was so thorough that some historians call the volunteer component of the pre-Civil War militia the *organized* militia while designating the common component the *enrolled* militia. In prior periods, of course, organized units had come from both the common and volunteer militia. In short, the Jacksonian era witnessed nearly total transformation of the militia from a compulsory to a voluntary system. Because many volunteer units were privately organized, recruited, and equipped, the militia became a partially privatized system as well. A third terminological variation clearly reflects this last trait: the volunteer militia became popularly known as the *uniformed* militia. States rarely provided uniforms to any militia units, so volunteer units purchased their own.

Many military historians have unfairly characterized the transformation to voluntarism as "the decay" of the militia.[46] Because of this so-called decay, the Mexican War became the first in U.S. history to be fought solely with volunteers. A remnant of the common militia survived, and Congress gave President James K. Polk the power to call the militia into national service for six months rather than the three months specified in the Calling Forth Act. Early in the war, General Edmund Gaines, commanding at New Orleans, made an unauthorized call for militia from the Southwestern states, and Louisiana's governor threatened a draft in order to raise his state's allotment. But the Polk administration quickly relieved Gaines and canceled his call.[47]

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[45]Weigley, *History of the United States Army*, p. 157. The flourishing of volunteer militia is covered in Mahon, "The Citizen Soldier in National Defense," pp. 189–201 ff.; Mahon, *The American Militia: Decade of Decision*, pp. 56–61; Mahon, *History of the Militia*, pp. 84–87; Cunliffe, *Soldiers and Civilians*, pp. 213–54; and Todd, "Our National Guard."

[46]Thus, Riker, *Soldiers of the States*, titles his third chapter "Degeneration of the Militia, 1792–1860"; Mahon, *History of the Militia*, titles his sixth chapter "Decline of the Militia: Rise of the Volunteers"; and Cunliffe, *Soldiers and Civilians*, has a sub-chapter on "The Militia in Decline." In contrast, John K. Mahon, "A Board of Officers Considers the Condition of the Militia in 1826," *Military Affairs* 15 (Summer 1951), pp. 85–94, reports that a War Department board that investigated the militia discovered that, even before the disappearance of the common militia, most experts believed the volunteer militia to be superior.

[47]An act of May 13, 1846, 9 *U.S. Statutes at Large* 9, recognized a state of war between Mexico and the United States, authorized the President to call

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Therefore, Polk could justifiably boast that in, waging the Mexican War,

> Unlike what would have occurred in any other country, we were under no necessity of resorting to drafts or conscriptions. On the contrary, such was the number of volunteers who patriotically tendered their services that the chief difficulty was in . . . determining who should be compelled to remain at home.[48]

Equally significant, the 60,931 federal volunteers, many from volunteer militia units, who served alongside the 42,374 U.S. regulars, displayed none of the previous military ineptitude of the drafted common militia. Whatever their other shortcomings, they won nearly all their engagements, although usually outnumbered.[49]

UNION AND CONFEDERACY DURING THE CIVIL WAR

The volunteer militia was so vibrant at the beginning of the Civil War that it brought to each side an enthusiastic influx of units—more units, in fact, than either could process. Civil War historian Kenneth P. Williams has observed that, within four months of the firing on Fort Sumter, the Union army multiplied by an astonishing factor of twenty-seven despite the defection of nearly half the country and of many professional officers. That sharply contrasts with the army's

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out the militia to serve for six months, and authorized the recruitment of 50,000 volunteers to serve for one year or the duration of the war.

On the unauthorized militia call by General Gaines, see K. Jack Bauer, *The Mexican War, 1846–1848* (New York: Macmillan, 1974), pp. 57–58; Kreidberg and Henry, *History of the Military Mobilization*, pp. 74–75; and Weigley, *History of the United States Army*, p. 183. Only Bauer, however, in his volume from the Macmillan Wars of the United States series, mentions the threatened Louisiana draft. General Zachary Taylor also made an earlier call, this one authorized, upon the common militia of Texas and Louisiana, when hostilities were impending, but I have uncovered no mention of any resulting draft. All 12,000 of the common militia that turned out as a result of both Taylor's and Gaines's calls were demobilized without seeing action. Otherwise, the national government relied on recruiting regulars and federal volunteers.

[48]As quoted in Cunliffe, *Soldiers and Civilians*, p. 204.

[49]See, for instance, Bauer, *The Mexican War*, passim. The most judicious summary of the relative merits of regulars and volunteers in the Mexican War is Weigley, *History of the United States Army*, pp. 173–89. The numbers of each appear in Kreidberg and Henry, *History of Military Mobilization*, p. 78.

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mere threefold growth, under a rigid system of conscription, during the four months at the beginning of the U.S. entry into World War I. It is doubtful that the Confederacy, which had to turn away as many as 200,000 volunteers during the Civil War's first year, could have so quickly mobilized a major army from scratch without the foundation provided by the volunteer militia.[50]

The tradition of the common militia was not dead, however. It was responsible for exemption fees and substitute hiring in both the Confederate and Union conscription systems. As pointed out above, the Southern states had never repealed their compulsory militia laws. As a result, before the Confederate Congress passed a conscription act in April 1862, some of them independently drafted soldiers to meet their manpower quotas.[51]

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[50]Following Upton, *The Military Policy of the United States*, pp. 227–47, most military historians—especially Fred A. Shannon, *The Organization and Administration of the Union Army* (Cleveland, Ohio: Arthur H. Clark, 1928), vol. 1, pp. 15–52; and A. Howard Meneely, *The War Department, 1861: A Study in Mobilization and Administration* (New York: Columbia University Press, 1928)—have denigrated the initial Union mobilization of manpower. Kenneth P. Williams, *Lincoln Finds a General: A Military Study of the Civil War* (New York: Macmillan, 1949–59), vol. 1, pp. 60–66, 114–48, and vol. 2, pp. 796–98, first corrected this misleading impression. His comparison of Civil War and World War I mobilization appears in vol. 1, pp. 120–1. See also Weigley, *History of the United States Army*, pp. 197–201, and Kreidberg and Henry, *History of Military Mobilization*, pp. 83–103.

There is woefully little on the creation of the Confederate army. Nearly the only treatments of any substance are Kreidberg and Henry, *History of Military Mobilization*, pp. 129–37; Albert Burton Moore, *Conscription and Conflict in the Confederacy* (New York: Macmillan, 1924), pp. 1–11; William C. Harris, *Leroy Pope Walker: Confederate Secretary of War* (Tuscaloosa, Ala.: Confederate Publishing Company, 1962), pp. 56–71; William L. Shaw, "The Confederate Conscription and Exemption Acts," *American Journal of Legal History* 6 (October 1962), pp. 368–405; and E. Merton Coulter, *The Confederate States of America, 1861–1865* (Baton Rouge: Louisiana State University Press, 1966), pp. 308–13.

[51]The initial Confederate conscription act of April 1862 permitted the hiring of substitutes, but this provision was repealed in December 1863. Only conscientious objectors could pay a $500 exemption fee, and only if they were Quakers, Dunkers, or Mennonites as of October 1862.

The standard account of Confederate conscription is Moore, *Conscription and Conflict in the Confederacy*. Moore, however, does not investigate Confederate conscription at the state level. Indeed, its existence probably

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Similarly, the first Union conscription law, passed in July of 1862, was only a modification of the old Calling Forth Act. It empowered the President to call out the militia for nine instead of three months, and, if the states failed to meet national quotas, authorized him to administer militia drafts directly, as Monroe's second conscription plan had requested during the War of 1812. Not until March of 1863 did Congress adopt a national conscription law similar to that of the Confederacy.[52]

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would have escaped historical notice entirely but for the intriguing contradiction posed by Governor Joseph E. Brown of Georgia, who resisted and bitterly denounced the central government's conscription act, but had earlier, on his own authority, conscripted men into the state forces. See Louise Biles Hill, *Joseph E. Brown and the Confederacy* (Chapel Hill: University of North Carolina Press, 1939), p. 80; Curtis Arthur Amlund, *Federalism in the Southern Confederacy* (Washington, D.C.: Public Affairs Press, 1966), p. 96; W. Buck Yearns, *The Confederate Governors* (Athens: University of Georgia Press, 1985), pp. 174–75, 201. William L. Shaw, "Conscription by the State through the Time of the Civil War," *Judge Advocate Journal* 34 (October 1962), pp. 33–36, gives a detailed case study of state conscription in Civil War Louisiana.

The Confederate draft, unlike the Union draft, but like modern conscription, had occupational exemptions, such as the exemption of one white man on each plantation of twenty or more slaves. The Confederate government pursued an active policy of economic intervention into the labor market by manipulating these exemptions. In February 1864, the Confederate Congress abolished all industrial exemptions and replaced them with the direct detailing of conscripted soldiers to industry. The inexorable logic of military conscription had led the nation of black agricultural slavery to the ironic but appropriate adoption of white industrial slavery.

[52]The Union Militia Act of July 17, 1862 is 12 *U.S. Statutes at Large* 597. The Union's national conscription act, or Enrollment Act, of March 3, 1863, is 12 *U.S. Statutes at Large* 731. It provided both for hiring substitutes and for a $300 commutation fee. An amendment of February 24, 1864, 13 *U.S. Statutes at Large* 6, provided that paying the fee bought exemption only from a specific call, not from subsequent calls. It also limited exemptions through substitutes. If the substitute was not subject to the draft himself, the duration of the exemption extended for as long as the substitute was in service. However, substitutes who were subject to the draft provided their purchaser only with an exemption from the current call. Congress on July 4, 1864, 13 *U.S. Statutes at Large* 379, abolished commutation except for conscientious objectors. Congress again amended the draft law on March 3, 1865, *13 U.S. Statutes at Large* 509, but by then the war was all but over.

Accounts of Union conscription include the second part of Leach, *Conscription in the United States*; the last part of the first volume and all of the

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(At least two Northern states, New York and Massachusetts, temporarily reimposed a compulsory militia system during the war.[53])

AFTER THE CIVIL WAR

The Civil War triumph of *national* conscription eliminated the militia's *raison d'être*. In the years after Appomattox, all the states finally buried the common militia. Even the volunteer militia was slow to revive. The peacetime enrollment of volunteer units never approached its pre-war *per capita* level. As an isolated elite of professionals came again to dominate membership in the organized militia, its connection with government at all levels became increasingly intimate. State governments assumed ever-greater responsibility for organizing, recruiting, and equipping the units, inspired partially by the desire for a reliable force to break labor strikes.

A general effort to more closely identify the organized militia with the national government caused most states to emulate New York in borrowing the French term "National Guard." Militia officers from around the nation in 1877 organized the National Guard Association, a pressure group to lobby for larger state and national appropriations.[54]

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second volume of Shannon, *The Organization and Administration of the Union Army*; Shaw, "The Civil War Federal Conscription and Exemption System"; Murdock, *Patriotism Limited, 1862–1865*; and Eugene C. Murdock, *One Million Men: The Civil War Draft in the North* (Madison: State Historical Society of Wisconsin, 1971). Good summary treatments, most of which also touch upon the Confederacy, are Kreidberg and Henry, *History of Military Mobilization*, pp. 83–113, 129–37; Cotton M. Lindsay, "Our National Tradition of Conscription: Experience with the Draft," in *Why The Draft? The Case for a Volunteer Army*, edited by James C. Miller, III (Baltimore: Penguin, 1968), pp. 124–37; O'Sullivan and Meckler, *The Draft and Its Enemies*, pp. 53–101; Rafuse, "United States' Experience with Volunteer and Conscript Forces," 14–19; and Weigley, *History of the United States Army*, pp. 197–211.

[53]Robert S. Chamberlain, "The Northern State Militia," *Civil War History* 4 (June 1958), pp. 105–18, and Shaw, "Conscription by the State," pp. 37–39.

[54]Post-Civil War militia history is well covered in Hill, *The Minute Man in Peace and War*, pp. 99–138; Mahon, *History of the Militia*, pp. 108–24; and Riker, *Soldiers of the States*, pp. 41–66. Riker attaches special importance to the National Guard's strike-breaking role, whereas Hill almost totally discounts it. One limited and temporary reversal in the militia's post-Civil War decline was the attempt by Southern Reconstruction governments to recruit former slaves into a volunteer militia. See Otis A. Singletary, *Negro Militia and Reconstruction* (Austin: University of Texas Press, 1957).

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Finally, in the wake of the Spanish-American War, Congress passed the Dick Act of 1902. Along with supplementary legislation, the Dick Act brought to final realization Washington's and Knox's old dream of a federally trained, controlled, and funded militia. The volunteer militia, which already had been de-privatized, was now fully nationalized. The only missing component of Knox's original scheme was conscription. The Dick Act did restate the principle of universal obligation in establishing what it called the Reserve Militia, but this was primarily a pro-forma vestige from the Federalist Uniform Militia Act. The Dick Act's substance applied to the wholly voluntary "organized militia, to be known as the National Guard."[55]

Conclusion

The birth of modern mass conscription has usually been attributed to the French Revolution. Napoleon's citizen armies first demonstrated the devastating potential of the *levee en masse*. But close examination of the traditional militia concept reveals that it had embraced the underlying ideal of universal obligation well before the revolution in France. The militia, therefore, become an important historical antecedent to the French creation of a nation at arms. The early years of the American Republic turn out to corroborate, rather than contradict, the general historical affinity between mass participation in government and mass participation in warfare, between democracy and conscription.[56]

Martha Derthick's history of the National Guard Association, *The National Guard in Politics* (Cambridge, Mass.: Harvard University Press, 1965), is, unfortunately, somewhat sparse on the Association's founding and early years. Another National Guard pressure group, founded eight years earlier (1871), was the National Rifle Association. It originally attempted to draw the Guard and the regular army closer together with organized rifle competitions.

[55]Act of January 21, 1903, 32 *U.S. Statutes at Large* 775.

[56]The classic account of the relationship between conscription and democracy is Hoffman Nickerson, *The Armed Horde 1793–1939: A Study of the Rise, Survival, and Decline of the Mass Army* (New York: G.P. Putnam's Sons, 1940). James M. McConnell, "European Experience with Volunteer and Conscript Forces," in *Studies Prepared for the President's Commission on an All-Volunteer Armed Force* (Washington, D.C.: U.S. Government Printing Office, 1970), vol. 2, offers a survey of the history of conscription in France, Germany, and Britain. A more recent scholarly examination of the French creation of the "armed horde," which adds some qualifications to the classic account, is Geoffrey Best, *War and Society in Revolutionary*

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Conscription not only was inherent in the traditional militia system, but may also have been the hidden factor behind that system's ill repute. The contrast in military competence between the U.S. citizen soldiers who fought in the War of 1812 and those who fought in the Mexican War is so striking that it has escaped the notice of few observers. Yet, most do not realize that, in the years between those two wars, the militia system underwent a dramatic transformation from compulsion to voluntarism, and none has drawn the obvious causal inference. On the contrary, American military theorists, starting with Washington and Knox and moving on to those of the present, have used the traditional militia's weaknesses to justify far more extensive conscription and universal military training. Ironically, they have sought more of the very feature that may have been responsible for the militia's poor military performance in the first place.

If libertarians wish to look to the past for guidelines about a free society's ideal defense, they must pass over the traditional militia system. Despite its appealing decentralist rhetoric and its close ties with the American Revolution, it was from the very core a coercive system, one clearly inimical to liberty. Instead, they should cast their eyes upon the volunteer militia of the Jacksonian period. Although maligned by military historians, forgotten by all others, and corrupted by post-Civil War statism, it is the one military precedent that most closely embodies libertarian precepts.

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PATENTS AND COPYRIGHTS: DO THE BENEFITS EXCEED THE COSTS?

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> It seems to me highly desirable that liberals shall strongly disagree on these topics, the more the better. What is needed more than anything else is that these questions of a policy for a competitive order should once again become live issues which are being discussed publicly; and we shall have made an important contribution if we succeed in directing interest to them.
>
> – F.A. Hayek[1]

> The greatest constraint on your future liberties may come not from government but from corporate legal departments laboring to protect by force what can no longer be protected by practical efficiency or general social consent.
>
> – John Perry Barlow[2]

Patents and copyrights are forms of immaterial "property" that grant to their owners exclusive control over the production and sale of a specified product—a literary or artistic work in the case of copyrights, an invention or productive process in the case of patents. Though these concepts are subsumed under the broader heading of "intellectual property," they are not completely analogous and cannot always

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[1]F.A. Hayek, "'Free' Enterprise and Competitive Order," in *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948), p. 112.

[2]John Perry Barlow, "The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age (Everything You Know about Intellectual Property is Wrong)," *Wired* 2.03 (March 1994), p. 3.

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be justified with the same arguments. The term "intellectual property" also applies to such entirely different concepts as trademarks. Unfortunately, in recent discussions of these topics, the concept of intellectual property has often been used generically, thereby blurring some important practical distinctions.

A trademark is a sign or label that distinguishes a given manufacturer's products from those of others. The trademark, once registered, grants its owner exclusive control over its use. This guarantees the source of the product, thus allowing consumers to buy with greater certainty (since the owners of well-known trademarks have incentives to protect their value by maintaining quality standards), and protecting manufacturers against forgeries (i.e., competitors trying to sell their own products by taking advantage of the good reputation of well-known trademarks). A trademark identifies the source of a product, but does not prohibit the manufacture of similar (or even identical) products, and therefore does not have the monopolistic character of the patent.[3]

The existence of a patent, on the other hand, prevents others from producing and selling the patented product. For this reason, many people who accept the protection of trademarks as perfectly legitimate and of vital importance in a modern capitalist economy nonetheless oppose patents on the grounds that they constitute monopoly privileges granted by government.

The purposes of this paper are to examine patents and copyrights in some detail, investigate their economic effects, and determine the extent to which they are compatible with the principles of a free society. This paper approaches the problem from a cost-benefit, utilitarian perspective, and will therefore deal only indirectly with arguments premised on rights-based considerations.[4]

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[3]If I decide to manufacture and sell Chivas Regal whiskey, I would be breaking the law. However, I can manufacture and sell whiskey provided that I do not use someone else's trademark.

[4]An excellent discussion of intellectual property issues from a rights-based, non-utilitarian perspective is that by N. Stephan Kinsella, "Against Intellectual Property," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001), pp. 1–54. See also Tom G. Palmer, "Are Patents and Copyrights Morally Justified?" *Harvard Journal of Law and Public Policy* 13 (Summer 1990), pp. 817–65; and Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law-and-Economics Approach," *Hamline Law Review* 12 (Spring 1989), pp. 261–304.

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PATENTS AS PROPERTY

Although the term "intellectual property" is commonly used in the legal field, it is rather problematic in economics, since it is difficult to justify this type of property right with the same arguments that are used to justify private property in tangible goods.

According to the economic theory of property (following David Hume), society benefits from the delimitation and protection of private property rights because goods are scarce. There is no point in defining property rights over abundant goods. On the other hand, when goods are scarce and property is communal, they are not used efficiently. Private property guarantees that scarce goods will be put to their most efficient and productive uses.

It is difficult to justify intellectual property rights under this concept of property, since these rights do not arise from the scarcity of the appropriated objects; rather, their purpose is to *create* scarcity, thereby generating a monopoly rent for holders of such rights. In such case, the law does not protect property over a scarce good, since the law itself created the scarcity, and this artificial scarcity generates the monopoly rents that confer value upon those rights. The big difference between patents and copyrights on the one hand, and tangible goods on the other, is that the latter will be scarce even if there are no well-defined property rights; in the case of patents and copyrights, the scarcity arises only after the property right is defined.[5]

Although defenders of patents often try to deny that patents constitute monopoly privileges by arguing that the term "monopoly" is inapplicable,[6] such an argument is merely semantic. There is no contradiction or incompatibility between the notions of "patent as property" and "patent as monopoly," and, in practice, they are closely related, since the monopolistic nature of patents is precisely what confers economic value upon them. According to Sigmund Timberg:

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[5]In this century, perhaps the clearest statement of this argument comes from a 1934 paper by English economist Arnold Plant, "The Economic Theory Concerning Patents for Inventions," in *Selected Economic Essays and Addresses* (London: Routledge & Kegan Paul, 1974), pp. 35–56. On Plant's economic thought, see R.H. Coase, "Professor Sir Arnold Plant: His Ideas and Influence," in *The Unfinished Agenda: Essays on the Political Economy of Government Policy in Honour of Arthur Seldon*, ed. M.J. Anderson (London: Institute of Economic Affairs, 1986), pp. 81–90.

[6]See, for instance, Michael Novak, *The Fire of Invention* (Lanham, Maryland: Rowman & Littlefield, 1997), pp. 69, 144.

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> A patent serves a fourfold purpose. Viewed morally and socially, and perhaps psychologically, it is a reward for unusual inventive ability. From the standpoint of economics and commercial law, it is a property right. Neither of these purposes—the reward to the inventor or the creation of a property right—have any restrictive economic effect in and of themselves. But then we come to the patent's third phase—from the vantage point of the state, a patent is a grant of a monopoly to the inventor based on the public interest in promoting the growth and diffusion of technology. *It is the monopoly grant that makes tangible the inventor's reward and converts a formal into a realistic property right.* Moreover, the monopoly grant has a *prima facie* impact on trade, because the monopoly conferred by the patent is the right to exclude others from manufacturing or selling the patented product, or from practicing the patented process.[7]

Hayek argues:

> The problem of the prevention of monopoly and the preservation of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. I am thinking here of the extension of the concept of property to such rights and privileges as patents for inventions, copyright, trade-marks, and the like. It seems to me beyond doubt that in these fields, a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly, and that here drastic reforms may be required if competition is to be made to work.
>
> In the field of industrial patents in particular, we shall have to seriously examine whether the award of a monopoly privilege is really the most appropriate and effective form of reward for the kind of risk-bearing which investment in scientific research involves. Patents, in particular, are specially interesting from our point of view, because they provide so clear an illustration of how it is necessary in all instances not to apply a ready-made formula, but to go back to the rationale of the market system and to decide for each class what the precise rights are to be which the

[7]Sigmund Timberg, "The Effect of the European Common Market on Anti-Trust and Patent Policy," in *Legal Problems in International Trade and Investment*, ed. Crawford Shaw (Dobbs Ferry, N.Y.: Oceana Publications, 1962), p. 72, emphasis added.

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> government ought to protect. This is a task at least as much for economists as for lawyers.
>
> Perhaps it is not a waste of your time if I illustrate what I have in mind by quoting a rather well-known decision in which an American judge argued that "as to the suggestion that competitors were excluded from the use of the patent we answer that such exclusion may be said to have been the very essence of the right conferred by the patent" and adds "as it is the privilege of any owner of property to use it or not to use it without any question of motive" [*Continental Bag Co. v. Eastern Bag Co.*, 210 US 405 (1909)]. It is this last statement which seems to me significant for the way in which a mechanical extension of the property concept by lawyers has done so much to create undesirable and harmful privilege.[8]

Obviously, like any other monopoly privilege, patents can be valuable for their owners, though that is not in itself a sufficient reason to justify concessions of that sort. There are several relevant questions here, such as:

- What implications do patents have for efficiency in the allocation of resources?
- Why would society want to award privileges of this sort to some of its members?
- How does society benefit from the existence of patents?
- Why should society grant special protection over the production and sale of certain products beyond what is implied in the protection of trademarks?

Though the literature on patents often stresses inventors' rights, a perusal of relevant legislation clearly shows that it also embodies a strong presumption that awarding patents for invention favors the public interest as well. The first formal patent law was that of the United States, passed in 1790 and based on a provision of the new Constitution of 1787, which, in its enumeration of the powers vested in Congress, included the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[9]

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[8]Hayek, "'Free' Enterprise and Competitive Order," pp. 113–14. See also F.A. Hayek, *The Fatal Conceit* (Chicago: University of Chicago Press, 1988), pp. 36–37.

[9]U.S. Constitution, art. 1, sec. 4, para. 8.

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In view of this, it is certainly interesting that, from the very beginning, there was never any real consensus as to the benefits of adopting a patent system. Some of the most prominent drafters of the U.S. Constitution (among them several outstanding inventors) were opposed to the idea, sometimes vehemently. One was Benjamin Franklin, who refused the offer of a patent for the invention of his famous stove. "As we enjoy great advantages from the inventions of others," he wrote, "we should be glad of an opportunity to serve others by any invention of ours; and this we should do freely and generously."[10]

Although patents of invention originated in Europe, there was, in the recent past, no consensus there, either. In fact, during the nineteenth century, an intense debate on the subject erupted, especially in the quarter century between 1850 and 1875, and at one point the victory of the anti-patent movement seemed likely. The eventual triumph of the pro-patent position in the legislative arena reflects a political, not necessarily an intellectual, victory.[11]

PATENTS AND TECHNICAL PROGRESS

Modern defenders of the patent system, dazzled by the wonders of modern technology, never cease to stress the need to stimulate further technological development. Often cited in this context are the famous pioneer studies by Robert Solow and Edward Denison on the importance of technical progress for the explanation of economic growth.[12]

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[10]Benjamin Franklin, *The Autobiography of Benjamin Franklin* (New York: P.F. Collier & Son, 1909), vol. 1, p. 112. Thomas Jefferson was also opposed to patents. See, for instance, his "Letter to Isaac McPherson (August 13, 1813)," in *The Portable Thomas Jefferson*, ed. Merril D. Peterson (New York: Viking Press, 1975). For a detailed discussion of Jefferson's views, see Hugo A. Meier, "Thomas Jefferson and a Democratic Technology," in *Technology in America: A History of Individuals and Ideas*, ed. Carroll W. Pursell, Jr. (Cambridge, Mass.: MIT Press, 1990), pp. 17–33.

[11]For a history of this now-forgotten debate, as well as a detailed survey of the voluminous English, German, and French literature that it generated, see Fritz Machlup and Edith T. Penrose, "The Patent Controversy in the Nineteenth Century," *Journal of Economic History* 10 (May 1950), p. 1–29.

[12]For instance, Robert M. Sherwood, *Intellectual Property and Economic Development* (Boulder, Colo.: Westview Press, 1990), pp. 82–83. The studies cited are Robert M. Solow, "Technical Change and the Aggregate Production Function," *Review of Economics and Statistics* 39 (1957), pp. 312–20; and

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The manner in which these studies are cited, however, is intriguing. These citations are made in such a general manner that readers inevitably get the impression that authors who resort to this tactic want to attribute the *entirety* of said technical progress to patented inventions. The fact is, however, that the notion of "technical progress" in Solow-Denison-type studies is a broad category that covers, in principle, any increase in production that cannot be attributed directly to increases in inputs or basic factors of production—i.e., it is equivalent to what we now term "total factor productivity." This includes not only the effect of new technologies (not all of which represent patented inventions), but also the effects of economies of scale and of improvements in the quality of the labor force, including better education (Denison tries to isolate the effect of education), health and nutritional levels of the labor force, and even changes in its demographic make-up.

Thus, it would be short-sighted to attribute "technical progress" entirely to technological innovation *per se*. But even discounting the important role of education and other improvements in the quality of the labor force, to attribute the residual effect entirely to a *certain type* of technological innovation (patented inventions) would be like attributing the effect of "education" entirely to formal instruction imparted in schools—another common error. The fact of the matter—contrary to what the pro-patents literature assumes—is that patented inventions account for only a fraction of relevant productivity growth.

Zvi Griliches, a leading expert on the study of productivity, is explicit on this point:

> Not all of productivity growth is due to invention, and only some fraction of the latter arises from patented inventions. If one takes 1.5 to 2.0 percent as the approximate growth rate per year in total factor productivity, at least half of it is likely to be due to the growth in the quality of the labor force, economies of scale, and various allocations of capital between assets and industries. Moreover, it is unlikely that patented inventions could account for more than half of the relevant advances in knowledge. This leaves us with at most a quarter of total productivity growth, and an unknown fraction of its fluctuations, to be attributed to patented invention.[13]

Edward F. Denison, *Accounting for Slower Economic Growth* (Washington, D.C.: Brookings Institution, 1979).

[13]Zvi Griliches, "Patent Statistics as Economic Indicators: A Survey," *Journal of Economic Literature* 28 (1990), p. 1699.

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Even this probably overstates the net effect of patents, since, in principle, we would like to estimate the *marginal* benefits derived from them, i.e., the inventions that would not have been produced without them. Since patent protection increases the average return on inventive activity devoted to patentable inventions, thereby inducing more activity of this kind, it seems safe to conclude that the elimination of patent protection would probably adversely affect production of such inventions. But what would be the magnitude of that loss? We cannot simply assume that *all* patented inventions are due to the existence of patents, since many—like Franklin's stove—would have been developed even without that incentive.

Indeed, there is not much agreement among economic historians as to the importance of patents to the Industrial Revolution. T.S. Ashton thought that patents were unimportant: "It is at least possible that without the apparatus of the patent system, discovery might have developed quite as rapidly as it did." Joel Mokyr expresses a similar view: "A patent system may have been a stimulus to invention, but it was clearly not a necessary factor."[14] On the other hand, Douglass North argues that patents had a significant impact:

> The failure to develop systematic property rights in innovation up until fairly modern times was a major source of the slow pace of technological change. . . . A systematic set of incentives to encourage technological change and raise the private rate of return on innovation . . . was established only with the patent system. . . . In the absence of property rights over innovation, the pace of technological change was most fundamentally influenced by the size of markets. Other things equal, the private return upon innovation rose with larger markets. An increase in the rate of technological change in the past was associated with eras of economic expansion. In summary, economic historians of the Industrial Revolution have concentrated upon technological change as the main dynamic factor of the period. Generally, however, they have failed to ask what caused the rate of technological change to increase during this period: often, it would appear that in arguing the causes of technological progress, they assume that technological progress was costless or was spontaneously generated. But in sum, an increase in the rate of technological progress will result from either an increase in the size of the market or an

[14]T.S. Ashton, *The Industrial Revolution, 1760–1830* (London: Oxford University Press, 1964), p. 11; Joel Mokyr, *The Lever of Riches: Technological Creativity and Economic Progress* (Oxford University Press, 1990), p. 177.

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> increase in the inventor's ability to capture a larger share of the benefits created by his invention.[15]

North is quick to point out, however, that

> It would of course be misleading to put too much stress on a single law. . . . More important than patent law per se is the development and enforcement of a body of impersonal law protecting and enforcing contracts in which property rights are specified.[16]

Again, it is important to stress that technological change is not the only source of productivity growth, and sometimes it is not even the major source. Interestingly enough, North goes on to cite his own study of productivity change in ocean shipping, which found that the major sources of the rise in total factor productivity from 1600 to 1850 were not primarily technological developments, but the decline of piracy (allowing ships to reduce manpower and armament, and also lowering insurance costs), an increase in the number of voyages per ship per year (due not so much to increased speed but to less average port time per ship), and an increased load factor on return trips.[17] The interesting point in this context is that none of these important sources of productivity change were primarily technological. North writes:

> declining transaction costs—a result of reduced piracy, increases in size of ships, growing trade, and reduced turnaround time—led to substantial productivity growth beginning (at least) 150 years before the Industrial Revolution; and they, *more than technological change*, were responsible for productivity increases.[18]

In any event, it seems reasonable to assume that patents must have *some* effect on technological innovation, which is confirmed by the theoretical models, but again, the interesting question is the practical magnitude of this effect.[19] In this regard, the predictions of the formal

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[15]Douglass North, *Structure and Change in Economic History* (New York: Norton, 1981), pp. 164–66.

[16]North, *Structure and Change in Economic History*, p. 165.

[17]Douglass North, "Sources of Productivity Change in Ocean Shipping, 1600–1850," *Journal of Political Economy* 76 (Sept/Oct 1968), pp. 953–70.

[18]North, *Structure and Change*, p. 166, italics added.

[19]Most modern formal models follow the "Nordhaus–Scherer model." See F.M. Scherer, "Nordhaus' Theory of Optimal Patent Life: A Geometric Interpretation," *American Economic Review* 62 (June 1972), pp. 422–27.

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models stand in striking contrast to the available empirical evidence: although the effect is theoretically important, the results of the few studies that have attempted to detect it empirically do not favor the pro-patents position.

Edwin Mansfield directed two important studies on this topic in the 1980s. The first studied thirty-one patented innovations in four industries: chemicals, pharmaceuticals, electronics, and machinery. One purpose of the study was to answer a simple question: what proportion of innovations would be delayed, or not introduced at all, if they could not be patented?

> To shed light on this question, we asked each innovating firm whether it would have introduced each of its patented innovations in our sample if patent protection had not been available. . . . According to the firms, about one-half of the patented innovations in our sample would not have been introduced without patent protection. The bulk of these innovations occured in the drug industry. *Excluding drug innovations, the lack of patent protection would have affected less than one-fourth of the patented innovations in our sample.*[20]

The results of the second study were even more negative:

> According to detailed data obtained from a random sample of 100 firms from 12 manufacturing industries, patent protection was judged to be essential for the development or introduction of one-third or more of the inventions during 1981–83 in only 2 industries—pharmaceuticals and chemicals. On the other hand, in 7 industries (electrical equipment, office equipment, motor vehicles, instruments, primary metals, rubber, and textiles), patent protection was estimated to be essential for the development and introduction of less than 10 percent of their inventions. Indeed, in office equipment, motor vehicles, rubber, and textiles, the firms were unanimous in reporting that patent protection was not essential for the development or introduction of *any* of their inventions during this period.[21]

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[20]Edwin Mansfield, Mark Schwartz, and Samuel Wagner, "Imitation Costs and Patents: An Empirical Study," *Economic Journal* 91 (December 1981), p. 915, italics added.

[21]Edwin Mansfield, "The R&D Tax Credit and Other Technology Policy Issues," *American Economic Review* 76 (May 1986), p. 193. On the other hand, as Mansfield points out, "this does not mean that firms patent only a small

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A more recent paper approaches this problem from a slightly different angle, but also fails to support the pro-patents position. If patents do indeed stimulate innovation, then presumably stronger patent protection should induce a higher rate of innovation. The authors addressed the question "Do Stronger Patents Induce More Innovation?" by studying the impact of a significant Japanese patent law reform implemented in 1988. Their main finding was that "the average response in terms of additional R&D effort and innovative output was quite modest." An econometric analysis using Japanese and U.S. patent data on 307 Japanese firms confirmed that the magnitude of the response was quite small.[22]

COSTS OF THE PATENT SYSTEM[23]

The benefits of patents, therefore, are not as large as one might assume at first glance. On the other hand, if these benefits were costless—if patents involved a sort of "free lunch"—then there would be no reason for complaint. The fact, however, is that there are several important costs that tend to be overlooked. Apart from the considerable administrative costs and legal expenses associated with patent litigation,[24] perhaps the most obvious economic cost of a patent system is that, in order to create incentives for the production of inventions that otherwise would not have been developed, patents create monopoly privileges over inventions that would have been developed even without the incentive. However, there are other important costs to consider.

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percentage of their patentable inventions. On the contrary, they seem to patent about 50 to 80 percent of them, which is testimony to their belief that the prospective benefits from patent protection . . . frequently exceed its costs."

[22]Mariko Sakakibara and Lee Branstetter, "Do Stronger Patents Induce More Innovation? Evidence from the 1988 Japanese Patent Law Reforms," Working Paper 7066, National Bureau of Economic Research, April 1999.

[23]A recent paper by Pierre Desrochers, "On the Abuse of Patents as Economic Indicators," *Quarterly Journal of Austrian Economics* 1, no. 4 (Winter 1998), pp. 51–74, provides a somewhat more extended discussion of this subject, and arrives at conclusions substantially similar to those reported here.

[24]"Legal fees during the 14-year long [Kodak-Polaroid] court battle cost Kodak . . . $100 million." Kevin G. Rivette and David Kline, "Discovering New Value in Intellectual Property," *Harvard Business Review* 78 (January–February 2000), p. 65.

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Patents as a Hindrance to Technical Progress

In practice, the patent system often hinders technical progress. In the automobile industry, for instance, Henry Ford did not own the patent over the automobile, and had to fight against the patent's owners, who constituted a closed cartel and were not interested in mass production of inexpensive models.

> At the time the Ford Motor Company was organized, the automobile industry was dominated by the Association of Licensed Automobile Manufacturers (ALAM), a select group of makers of gasoline automobiles who were attempting to monopolize automobile manufacturing in the United States through control of a patent on the gasoline automobile that had been awarded in 1895 to George B. Selden, a New York patent attorney. The ALAM companies . . . were in the main committed to high unit profits through producing high-priced cars for a limited market. The ALAM tried to set production quotas and to freeze new entrances into automobile manufacturing. Henry Ford was denied a license . . . under the Selden patent on the ground that he had not demonstrated his competence, and when Ford persisted in producing cars, the ALAM immediately brought a lawsuit against him for infringement of the Selden patent. The suit was ultimately decided in Ford's favor in 1911 and the ALAM disintegrated.[25]

Another interesting case is the early history of aviation.

> Orville and Wilbur Wright . . . mimicked the wing twisting of gliding birds by constructing a mechanism that warped the horizontal plane of an airplane's wings at either side in opposite directions. They patented this mechanism and claimed in their patent that their rights extended to any system that varied the "lateral margins" in opposite directions.

Another group of aviation pioneers, financed by Alexander Graham Bell,

> knew about the Wright patent but apparently had reservations about the wing-warping method. . . . Bell suggested wing flaps, or "ailerons," which had been used in France. [Glenn] Curtiss subsequently incorporated this concept in his successful flights of 1908. . . . The Wrights sued Curtiss for patent infringement in 1909, claiming that their

[25]James J. Flink, "Henry Ford and the Triumph of the Automobile," in *Technology in America*, pp. 181–82.

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> method applied to wing flaps as well as wing twisting. After protracted litigation, Orville Wright . . . won the case in 1914. . . . Curtiss [then made] a small change in his method of controlling the ailerons, which required the Wright corporation to begin litigating anew. Orville Wright sold out at this point, but the successor company continued to press its claims. With the formal entry of the United States into World War I imminent, however, the government sought a solution to the patent litigation, since some firms were reluctant to take contracts because of the threat of patent infringement suits. The Wright-Martin Company . . . was threatening to sue those considered to be infringers—effectively any airplane manufacturer.[26]

The same author points out that

> It seems unlikely that broad definitions—a patent on the automobile or on the airplane—could be defended on economic grounds. Although the Wright brothers threw their energies into airplane invention in the hope of becoming wealthy . . . others, imagining much smaller rewards looming ahead of them, were right behind. The development of a successful flying machine was only a matter of time, and it is unlikely that the introduction of the airplane a few years sooner would have been worth a monopoly grant on the airplane.[27]

Inordinately broad patents are especially problematic. "For nearly a quarter of a century, for example, James Watt was able to prevent other engineers from constructing new types of steam engine, even under license from himself." At least one historian argues that the Industrial Revolution did not really take off until 1785, the year Watt's patent expired.[28]

A recent example comes from the field of bio-technology. In October 1992, the U.S. Patent and Trademark Office awarded to a single company, Agracetus Inc., of Middleton, Wisconsin, a patent for rights to *all forms* of genetically engineered cotton—no matter what techniques or genes are used to create them—prompting the

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[26]George Bittlingmayer, "Property Rights, Progress, and the Aircraft Patent Agreement," *Journal of Law and Economics* 31 (April 1988), pp. 230–32.

[27]Bittlingmayer, "Property Rights, Progress, and the Aircraft Patent Agreement," p. 246.

[28]Ashton, *The Industrial Revolution*, p. 10. Louis Rougier, *The Genius of the West* (Los Angeles: Nash Publishing, 1971), p. 118.

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following comment from an industry executive: "It was as if the inventor of the assembly line had won property rights to all mass-produced goods, from automobiles to washing machines."[29]

Patents and Product Differentiation

The existence of patents also induces wasteful expenditure of resources by competitors trying to "invent around the patent," i.e., to develop competing products that are sufficiently differentiated so as not to infringe on an existing patent. Nelson puts it this way:

> There are incentives for a firm to duplicate the prevailing best technology patented by another firm in a way that does not infringe on patents. More generally, there are incentives for a firm to develop a technology even if it is worse than the current best one, if it is better than the one it has and the best is blocked by patents.[30]

Thus, although these activities increase the level of research-and-development spending, from the social point of view they are not necessarily an efficient use of available resources.

Worse still, patent owners also have incentives to invent around their own patents to preclude potential competition. To the extent that the patent system itself induces these activities, resources devoted to them (as well as the associated legal expenses) are essentially wasted from the social point of view, and should be regarded as another cost of the system. For example, to protect its monopoly position in the market for plain-paper copiers, Xerox patented every conceivable aspect of its technology. "IBM had spent millions to 'invent around' Xerox's major patents—with 25 percent of the budget going for patent counsel, not R&D."[31]

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[29]Richard Stone, "Intellectual Property: Sweeping Patents Put Biotech Companies on the Warpath," *Science* 268 (May 5, 1995), p. 656.

[30]Richard R. Nelson, "Assessing Private Enterprise: An Exegesis of Tangled Doctrine," *Bell Journal of Economics* 12 (Spring 1981), p. 107; see also, by the same author, "Research on Productivity Growth and Productivity Differences: Dead Ends and New Departures," *Journal of Economic Literature* 19 (September 1981), p. 1047.

[31]Timothy F. Bresnahan, "Post-Entry Competition in the Plain Paper Copier Market," *American Economic Review* 75 (May 1985), p. 16. For an interesting case study of "preemptive patenting" during the early history of radio broadcasting, see Leonard S. Reich, "Research, Patents, and the Struggle to Control Radio," *Business History Review* 51 (Summer 1977), pp. 208–35.

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Enforceability and Innovation

Technological innovation is often stimulated precisely when patents are not effective. This was the case with Eastman Kodak, which adopted its well-known policy of permanent research and "continuous innovation" as a way to maintain its competitive leadership in view of the practical impossibility of enforcing all of its patents.[32] Presumably, had they been able to enforce their patents, they might well have devoted fewer resources for research and development of new products, and technological development in this industry would have been less rapid.

Distorted Incentives

One aspect of this problem that does not receive adequate consideration is the fact that the existence of patents might distort incentives, diverting inventive activity toward more easily "patentable" products. Again, we should bear in mind that not all discoveries and innovations are patentable, even when they are highly beneficial. Milton Friedman made an interesting comment in this regard. After declaring himself pro-patents, he added:

> At the same time, there are costs involved. For one thing, there are many "inventions" that are not patentable. The "inventor" of the supermarket, for example, conferred great benefits on his fellowmen for which he could not charge them. Insofar as the same kind of ability is required for the one kind of invention as for the other, the existence of patents tends to divert activity to patentable inventions.[33]

Consider a case in point:

> The biotech firm Genetics Institute decides which version of a drug to develop partly based on which iteration shows the best results in clinical trials but also according to which version can command the strongest patent protection. Genetics Institute patent counsel says the strength of the potential patent position is "a leading factor" in deciding what research to pursue.[34]

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[32]Reese V. Jenkins, "George Eastman and the Coming of Industrial Research in America," in *Technology in America*, pp. 134–36.

[33]Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 127.

[34]Rivette and Kline, "Discovering New Value in Intellectual Property," p. 58.

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This leads us back to the key question: in the absence of patent laws, would we really have fewer inventions, or would we simply have different *kinds* of inventions?

THE CASE OF COPYRIGHTS [35]

Murray Rothbard thought that patents and copyrights are actually quite different forms of legal protection, and made a strong case *in favor of* copyrights but *against* patents.[36] This is not a common viewpoint, as opinions on intellectual property tend to be "all or nothing." Nonetheless, it is a respectable position with a distinguished intellectual ancestry that runs at least as far back as Henry George:

> The two things [patents and copyrights] are not alike, but essentially different. The copyright is not a right to the exclusive use of a fact, an idea, or a combination, which by the natural law of property all are free to use; but only to the labor expended in the thing itself. It does not prevent any one from using for himself the facts, the knowledge, the laws, or combinations for a similar production, but only from using the identical form of the particular book or other production—the actual labor which has in short been expended in producing it. It rests therefore upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of any one else to do likewise.
>
> The patent, on the other hand, prohibits any one from doing a similar thing, and involves, usually for a specified time, an interference with the equal liberty on which the right of ownership rests. The copyright is, therefore, in accordance with the moral law—it gives to the man who has expended the intangible labor required to write a particular book or paint a picture security against the copying of that identical thing. The patent is in defiance of this natural right. It prohibits others from doing what has already been attempted.
>
> Every one has a moral right to think what I think, or to perceive what I perceive, or to do what I do—no matter

[35]The views expressed in this section are largely based on Arnold Plant, "The Economic Aspects of Copyright in Books," in *Selected Economic Essays and Addresses*, pp. 57–86; and Robert M. Hurt, "The Economic Rationale of Copyright," *American Economic Review* 56 (May 1966), pp. 421–32.

[36]See Murray N. Rothbard, *Man, Economy, and State* (Princeton, N.J.: Van Nostrand, 1962), pp. 652–60.

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> whether he gets the hint from me or independently of me. Discovery can give no right of ownership, for whatever is discovered must have been already here to be discovered. If a man makes a wheelbarrow, or a book, or a picture, he has a moral right to that particular wheelbarrow, or book, or picture, but no right to ask that others be prevented from making similar things. Such a prohibition, though given for the purpose of stimulating discovery and invention, really in the long run operates as a check upon them.[37]

It is interesting to note that, once we establish a major distinction between copyrights and patents, four situations are theoretically possible: one might favor both (the conventional view), one might oppose both (a minority view), one might favor copyright but oppose patents (the George-Rothbard view), or one might oppose copyright but favor patents (a conceptual possibility, though it appears to be an empty set —no one seems to have articulated this position publicly).

In any event, though patents and copyrights have different legislative histories, they share several features, and much of what has been said about patents applies equally to copyrights. Just as the pro-patents literature stresses inventors' rights, the pro-copyrights literature stresses the rights of authors and other creators to benefit from their creations. However, it should be noted that the term "copyright," as currently used, actually comprises a bundle of several different rights that are unfortunately (and misleadingly) conflated due to the use of a single concept to describe the whole bundle.

The expressions used in other languages to denote "copyright" (*derecho de autor, droit d'auter, diritto d'autore, direito do autor*) literally translate as "authors' rights," which include the notion of copyright in the narrower sense (the right to control reproduction of the work), though it also implies a broader range of rights. These include the so-called "moral rights" of the author, which view literary and artistic works as extensions of the author's personality, and encompass the following protections: (1) the right to be identified as the creator of the work (so-called "paternity rights" of authorship and protections against plagiarism), and (2) protections against unauthorized alterations or mutilations of the work (so-called "integrity rights" of authorship). As opposed to mere copyright, these two moral rights of authorship have always been regarded as inalienable and perpetual.

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[37]Henry George, *Progress and Poverty* (1879; reprint, New York: Robert Schalkenbach Foundation, 1990), p. 411n.

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A third moral right is also recognized: the right to withhold publication, which is an aspect of a broader right to privacy. However, it is not always clear whether it should be regarded as perpetual, or whether it applies only to living authors, i.e., if society should be bound by an author's wishes after his death.

Opposition to copyright in the narrower sense does not imply opposition to the moral rights of authorship, which are ancient legal concepts. Copyright, on the other hand, is a fairly recent notion which dates from about the time of the invention of printing. Whether or not we regard the right to control the reproduction of creative works as a "natural right" of authors, the historical fact is that, prior to the invention of printing, this right was not regarded as implicit in the concept of authorship. Copyright law was created by specific acts of legislation, and every extension of its scope to cover new productions resulting from technological innovations (such as photography, phonographic recordings of musical creations, film productions, computer software) has required special legislation to that effect, since these extensions did not arise "naturally" from judicial decisions, as the courts were unwilling to apply to these situations a concept created specifically for the case of printed books.

> The concept of copyright is rooted in the technology of print. The recognition of a copyright and the practice of paying royalties emerged with the printing press. . . . Copyright was a specific adaptation to a specific technology, and to the problems and opportunities it created. The law recognized that.
>
> The landmark case in the United States was *White Smith v. Apollo* [1908]. It denied protection to piano rolls or sound recordings because they were not "writings" in tangible form readable by a human being. That common law concept of copyright excluded from protection many new technologies of communication since 1908. But the motion picture industry, the recording industry, and more recently the broadcasting industry have persuaded Congress to extend various protections to them, since courts were not willing to do so. . . .
>
> However, with the arrival of radio and electronic reproduction, and now photocopy reproduction, the concept becomes inappropriate. There is no easy way to keep tabs on the numerous reproductions in somewhat variable form that can take place in innumerable locations with these new technologies. The analogy is to word-of-mouth communications in the 18th century, not to the print shop of that era.

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Nonetheless, information and publishing industries, whose welfare and survival depends on finding some way to charge for their information processing services, have latched on to copyright protection under statute law, and are trying to get the courts or the Congress to extend copyright protection to computerized data, photocopies, and telereproduction. Though recognizing that in those technologies the existent copyright law is basically unenforceable, they nonetheless grab on to whatever frail reed it may provide, rather than turn to the even frailer reed of trying to invent, and to get into legislation, some entirely new as yet undevised system for rewarding the creators of information. . . .

The U.S. Congress passed a new copyright law in 1976, which was designed to solve all the new problems of copyright for cable television, photocopying, and computers. It has solved few if any of them. . . .

How inappropriate the concept of copyright is to computer communications becomes evident as we examine how the law has to squirm to deal with the simplest problems. . . . The process of computer communication entails processing of texts that are partly controlled by people and partly automatic. They are happening all over the system. Some of the text is never visible but is only stored electronically: some is flashed briefly on a terminal display; some is printed out in hard copy. . . . The receivers may be individuals and clearly identified, or they may be passers-by with access but whose access is never recorded; the passer-by may only look, as a reader browsing through a book, or he may make an automatic copy; sometimes the program will record that, sometimes it will not. To try to apply the concept of copyright to all these stages and actors would require a most elaborate set of regulations. It has none of the simplicity of checking what copies rolled off a printing press. . . .

One would like to compensate an author if a computer terminal is used as a printing press to run off numerous copies of a valuable text. One would not like to impose any control as someone works at a terminal in the role of a reader and checks back and forth through various files. The boundary, however, is impossible to draw. In the new technology of interactive computing, the reader, the writer, the bookseller, and the printer have become one. In the old technology of printing, one could have a right to free press for the reader and the writer but try to enforce copyright on the printer and the bookseller. That distinction will no longer work, any more than it would ever have worked in the past on conversation.

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> Those whose livelihood is at stake in copyright do not like that kind of comment. They contend that creative work must be compensated. Indeed it must. . . . But the system must be practical to work. . . . In an era of infinitely varied, automated text manipulation, there is no reasonable way to count copies and charge royalties on them. . . . It may be very unfair to authors. It may have a profoundly negative effect on some aspects of culture, and in any case, whether positive or negative, it may change things considerably.
>
> If it becomes more difficult for authors and artists to be paid by a royalty scheme, more of them will seek salaried bases from which to work. Some may try to get paid by personal appearances or other auxiliaries to fame. Or the highly illustrated, well-bound book may acquire a special significance if the mere words of the text are hard to protect. Or one may try to sell subscriptions to a continuing service. . . . These are the kinds of considerations one must think about in speculating about the consequences for culture of a world where the royalty-carrying unit copy is no longer easy to protect in many of the domains where it has been dominant. . . . It is clear that with photocopiers and computers, copyright is an anachronism.
>
> Like many other unenforceable laws that we keep on the statute books from the past, this one may be with us for some time to come, but with less and less effect.[38]

The final passages from this rather long quotation suggest the intriguing possibility that, in arguing whether authors "should" have a copyright over their creations, we may be posing what will increasingly become a moot question: technological developments in certain areas—photocopiers, video and sound recording, computer scanning, etc.—are making it harder and harder to enforce the law. We may, at some point, have to give up—indeed, we may have already reached this point in the case of musical recordings, due to the development of downloadable ".mp3" computer files[39]— so the interesting question then becomes: what would be the consequences of a world without copyright? Since the main *utilitarian* argument for copyright is that it stimulates literary and artistic creation, the relevant question should

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[38]Ithiel de Sola Pool, *Technologies without Boundaries: On Telecommunications in a Global Age* (Cambridge, Mass.: Harvard University Press, 1990), pp. 254–59.

[39]For a balanced and informative analysis of the implications of the ".mp3" revolution, see Charles C. Mann, "The Heavenly Jukebox," *Atlantic Monthly* 286 (September 2000), pp. 39–59.

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be: would the absence of copyright significantly affect the quality and quantity of literary/artistic output?

Academic and Ideological Authors

Even today, most authors never make much money writing books, and some actually print their works with their own money. Others are willing to accept payment in copies of their works (often in the form of off-prints of journal articles). Much scientific and academic writing is of this kind. For many of these authors, writing for publication is a way to increase their "brand-name capital" in order to obtain higher incomes from other activities.

Other authors are interested in spreading their views, so they presumably have no interest in discouraging reproduction of their writings—provided their authorship is acknowledged, they would be quite happy if others were willing to reprint them with their own resources. The output of this type of writing would evidently not be much affected by the absence of copyright.

Professional Writers

Other writers do it for a living. If there is no other way to reward them, then the absence of copyright would most likely reduce their literary output. The question is whether copyright is the only way to guarantee an income for this type of writer. Plant, for one, thought that writers would find a way to sell their product, provided that a demand for it exists at all.[40]

We cannot know *a priori* what kinds of market structures would dominate in a different legal setting, though possibly (as Pool suggested) there would be greater reliance on salaried writers for subscription-type publications, perhaps with content more or less "given away" as loss-leaders to stimulate sales of other products. This is the business model underlying present-day journalism, which essentially hires staff writers in order to help sell the main product, which is advertising.

There are many other examples of such arrangements. Early radio broadcasters, for instance, were subsidized by radio manufacturers,

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[40]Copyright does not *create* this demand, it only provides a means to *monopolize* a demand once it exists. See Plant, "The Economic Aspects of Copyright in Books," p. 61.

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who were willing to lose money on broadcasting in order to stimulate demand for radio sets. This may also solve the problem of computer software in the absence of copyright. Many claim that if software could be copied freely, then software developers would have no incentive to create it. Note, however, that *hardware* manufacturers would have an incentive to support software development (and perhaps even give it away), since the availability of more and better software increases the demand for hardware.

Also, as Pool suggests, there might be greater reliance on such collateral sources of income as personal appearances, lectures, consulting, live performances, etc. In the case of music, it is interesting to note that, prior to the development of the phonograph, copyright over music applied only to sheet music; i.e., it did not extend to musical performance. It is an open question whether the gradual extension of copyright to cover not only musical recordings but *any* kind of public performance has resulted in increased quantity and quality of musical composition. In any case, if musical recordings could be freely copied (which increasingly happens to be the case now), musicians would still have an incentive to compose and record music in order to stimulate the demand for live performances.

Whether alternative market arrangements would fully compensate for the loss of income currently derived from copyright is an empirical question. Best-selling writers and composers might well earn less money in a world without copyright. If so, then the *quantity* of literary and artistic output would most likely be lower, but how much lower we cannot know.

Title "Lotteries"

One ingenious argument proposed by Plant suggests that in the case of book publishing, the absence of copyright protection would likely result in a smaller number of *titles* published.[41] This would not necessarily be a bad thing, since what we really want is not more titles, but more good books at lower prices. Plant argues that the copyright system has a somewhat perverse consequence in that it encourages publication of more titles, but not enough copies of the books people really want to read.

Because of the nature of his business, a publisher cannot be sure of the success of a new title, and most titles do not cover their costs.

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[41]Plant, "The Economic Aspects of Copyright in Books," pp. 72, 80.

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However, a successful title can be quite profitable, and these profits subsidize losses from unsuccessful titles. Since a publisher cannot know beforehand which new titles will be successful, publishing has some aspects of a lottery: in order to make money on successful titles, the publisher has to take a chance on many different titles, most of which he knows will be failures.

Copyright affects this situation by increasing the profitability of successful titles: in terms of the lottery, copyright protection increases the "prize" without affecting, on the other hand, the risks involved. *Ceteris paribus*, we expect that, with equal risks, a larger prize will induce a player to buy more "tickets." Therefore, more *titles* will be published under a copyright system, but the resulting monopoly position guarantees that the books people really want (the successful titles) will be published in smaller quantities and at higher prices.

CONCLUSIONS

Issues related to intellectual property rights are becoming increasingly important in policy discussions. Technological developments have created whole new areas of patentable products that pose problems for the definition and delimitation of "property rights," e.g., biotechnologies and computer software, to mention only two of the most noteworthy areas at the cutting edge of leading technologies—witness the problems involved in "patenting life-forms," and the question of so-called "internet patents."[42]

At the same time, some of these very developments are making it harder to enforce many of the more conventional forms of intellectual property—for instance, the advent of ".mp3" file-swapping on the Internet, which raises questions regarding the future viability of copyright in musical recordings. The stresses and strains which newer technologies are imposing on current intellectual property law have led to calls for tougher and more stringent enforcement of existing legal mechanisms. For several years, the United States government

[42]On the former, see John H. Barton, "Patenting Life," *Scientific American* 264 (March 1991), pp. 18–24. Regarding the latter, in October 1999, Priceline.com sued Microsoft's Expedia group for infringement of its patented "name your own price" auction system, while Amazon.com, the leading Internet book retailer, sued its main rival, Barnes & Noble, for infringement of its patented "one-click" ordering system. See Rivette and Kline, "Discovering New Value in Intellectual Property," pp. 56, 66.

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has taken the lead worldwide in pressuring other countries to strengthen their intellectual property laws and make them more closely conform to current U.S. standards.

In view of such developments, now is a good time for a radical rethinking of traditional intellectual property concepts. Instead of considering reforms to *strengthen* patents and copyrights, perhaps we should be moving in the opposite direction. To be sure, given current trends, copyright might well die out on its own, whether we like it or not. If so, discussions of the merits of copyright will become essentially moot.

As for patents, in the absence of precise estimates of the costs and benefits of patent systems, we cannot provide an unequivocal answer to the question posed in the title. Perhaps we will never know for sure. However, we *can* point out that the benefits stressed by the pro-patents camp turn out, on closer inspection, to be smaller than conventionally assumed, while there are many costs involved that can easily be overlooked. Thus, the cost-benefit relationship is not as favorable as the pro-patent camp would have us believe. At the very least, we should oppose current efforts to broaden the scope of patent and copyright laws until a stronger case can be made that the benefits do, indeed, exceed the costs.

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BOOK REVIEWS

Edited by N. Stephan Kinsella*

RONALD STEEL. *WALTER LIPPMANN AND THE AMERICAN CENTURY*. NEW ED. NEW BRUNSWICK, N.J.: TRANSACTION, 1999. PP. 669. WITH A NEW INTRODUCTION BY THE AUTHOR.

Ronald Steel's biography of Walter Lippmann reads like a history of the first three-quarters of the twentieth century. Lippmann lived through and helped forge a period of extraordinary transformation in American life.

He was unusually prolific, and the subject of much critical acclaim. Even when his work was occasionally panned, it rarely failed to excite lively discussion and controversy. At only 23, he published the well-received *A Preface to Politics*, and the following year released *Drift and Mastery*, which still stands as a classic statement of the progressive creed.[1]

At 27, he served as a member of the Inquiry, the secret organization of intellectuals that Woodrow Wilson summoned to devise a workable arrangement for international order at such time as World War I should end. Lippmann was an adviser to presidents and a celebrity honored throughout the world.

He spent his early years at the progressive *New Republic* magazine, and went on from there to a position with the *New York World* in 1920. At the time he joined, the *World* had a reputation for sensationalism and yellow journalism; under Lippmann's influence, the paper became

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[1]Walter Lippmann, *A Preface to Politics* (New York: M. Kennerley, 1913); Walter Lippmann, *Drift and Mastery: An Attempt to Diagnose the Current Unrest* (New York: M. Kennerley, 1914).

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more sober and nuanced, though it never quite reached the level of professionalism that Lippman sought.

Indeed, it was precisely this quality that made Lippmann's editorials, however elegant, unsuited to the *World*'s traditional blue-collar audience from whom Lippmann found himself increasingly estranged and alienated. This was not merely a stylistic or editorial idiosyncrasy. As Steel explains, it symbolized Lippmann's conviction that Alexander Hamilton had it right: the masses, far from constituting the virtuous backbone of the republic that Thomas Jefferson had supposed, were, in fact, an uninformed mob from which the republic had to be protected.

Lippmann developed this theme over the course of his first several books, all of which attracted enormous critical acclaim for the young author. How, he asked, can the great mass of people, on whom the fortunes of the country rest, possibly possess the immense knowledge necessary to make sober and wise political judgments in a nation and world growing so complex? He answered this question a number of different ways over the course of his career, but he is best known for his central contention, which he later repudiated, that only a knowledgeable and well-trained elite, sheltered from the mercurial passions of the American people, could ultimately be trusted to direct the nation's affairs.

All of this is fairly standard Lippmann fare. But Steel also reconstructs Lippmann's views on a number of much more personal matters, none more so than his Jewish background. "Although he had grown up in a Jewish world," Steel writes, "he resisted confining himself to it, or even identifying with it. He dealt with his Jewish identity largely by choosing to ignore it" (p. 186).

When he briefly addressed the issue in the late 1910s and early 1920s, he did so in language that jolts the modern ear. For example, he said in print that just as "Jew-baiting produced the ghetto and is compelling Zionism, the bad economic habits of the Jew, his exploiting of simple people, has caused his victims to assert their own nationality" (p. 189).

"Nothing is more disheartening to me than the kind of tribal loyalty which you ask of me," he told *Menorah Journal* editor Henry Hurwitz, who had been shocked by Lippmann's comments. "You need not expect it of me. You need not expect me to subscribe to the myth of an innocent Jewish people unreasonably persecuted the world over. The guilt is not as one-sided as most Jews would like to believe" (p. 189).

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Lippmann appears to have held this position for the rest of his life. He consistently refused to join, or even address, Jewish organizations, even spurning an award from the Jewish Academy of Arts and Sciences. Needless to say, Lippmann was at no time a Zionist. Steel recounts the testimony of one of Lippmann's friends who explained that even when they played Scrabble, she refrained from using the word "Jew" so as not to upset him (p. 196).

Steel also captures something of the texture of American life in the early part of the century by showing that, for the most part, even the Left partook of the basic decency that then characterized the nation. Thus, when the New York police, "in an election year show of concern for public morals, raided the popular girlie revue Earl Carroll's *Vanities*, Lippmann gave a nod of approval." The show, he said, had perpetrated "deliberate and commercial" obscenity, and "aimed to provide the maximum erotic excitement the law will permit." A salutary fine would "discourage the too-rapid advance of competitive smut." Dirty magazines, for that matter, should be "driven off the newsstands and put out of sight. . . . There is no more reason why these things should be displayed on the streets than that the garbage should be dumped in City Hall Park" (pp. 208–9).

Politically, Lippmann was a progressive of sorts, albeit one whose views occasionally diverged from those of his fellows. Although he had come to oppose Herbert Hoover by the end of his term, Lippmann had been one of the Great Engineer's top supporters in 1920. He perceived in Hoover, quite correctly, the impulse for intervention and the instincts for management that characterized the progressive mentality. He would later observe that Hoover's "historic position as a radical innovator has been greatly underestimated and . . . Mr. Roosevelt's pioneering has been greatly exaggerated" (p. 286)—a point that was not fully absorbed in academic circles until decades later by means of revisionist scholarship, most notably that of Murray Rothbard.

Neither was Lippmann especially sold on Franklin D. Roosevelt. FDR was "an amiable boy scout," a "pleasant man who, without any important qualifications for the office, would very much like to be President" (p. 292). But new blood was essential, he thought, and the amiable boy scout at least had potential.

Lippmann was of two minds concerning the New Deal. He accepted nearly of all its key programs, and considered opposition to the welfare state to be unreasonable. At the same time, for a liberal,

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he was unusually fearful of the potential for dictatorship along the fascist model that Depression conditions invited. He was friendly with F.A. Hayek, whose *The Road to Serfdom* was intended as a warning to "progressives" that economic collectivism inevitably led to political tyranny. Alan Brinkley points out that, in 1937, Hayek actually wrote to Lippmann, "I wish I could make my 'progressive' friends . . . understand that democracy is possible only under capitalism and that collectivist experiments lead inevitably to fascism of one sort or another."[2]

Though not a classical liberal, Lippmann appreciated Hayek's warning, and could easily be critical of an executive run amok. Roosevelt's court-packing scheme, a rather naked attempt to overcome judicial obstacles to the New Deal, elicited shock and outrage from Lippmann, who, over a period of five months in 1937, devoted thirty-seven columns to the subject. In what he later described as a "protest vote," he actually voted for Alf Landon in 1936 (p. 318).

Especially bizarre, though, is that Lippmann himself had urged Roosevelt in 1933, "The situation is critical. You may have no alternative but to assume dictatorial powers." He rationalized his apparent about-face by noting that while FDR had been granted extraordinary powers for the sake of laying the groundwork for economic recovery, the reform programs of the Second New Deal went well beyond this modest goal. "The people gave Mr. Roosevelt a sword to lead them in a particular battle," he wrote. "That battle is over, and that sword should now be returned to its scabbard" (p. 316).

For all his mental prowess and occasionally unpredictable intellectual trajectory, Lippmann was by no means immune from academic fashion: he swallowed whole the economic analysis of his friend John Maynard Keynes, for instance. Keynes, a delighted Steel tells us, persuaded Lippmann from his superstition in favor of balanced budgets, explaining instead the need for government to stimulate the economy through deficit spending during economic downturns (and to raise taxes to slow an economy at risk of overheating). Economists of the Austrian school have observed scornfully (and correctly) that the overwhelming success and influence of Keynes's *General Theory* derives less from its inherent persuasiveness and scholarly rigor than

[2]Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Alfred A. Knopf, 1995), p. 158.

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from the fact that it provided an intellectual veneer to the kind of national economic management that leftists wanted to engage in anyway. In Lippmann's case, his distrust and even contempt for *laissez faire* and his conviction that an educated elite ought to manage the nation's affairs made him a ready convert to the new economic doctrines of fiscal policy and demand management.

Steel's eminently predictable and almost painfully trite economic commentary, particularly in his discussion of the Depression and the New Deal, is the book's greatest weakness. Thus, he criticizes Lippmann's early timidity, reflected in his opposition to "the child-labor amendment, a federal guarantee of civil rights, and early payment of veterans' bonuses," for failing to "recogniz[e] that the crisis demanded extraordinary measures" (p. 289)—a conclusion by no means obvious, and one that can hardly be expressed as though it were common knowledge.

According to Steel, Lippmann's concerns about political tyranny resulting from a concentration of power in the executive during the New Deal years indicated that "he was less sensitive than he might have been to economic injustice and inequality" (p. 322). Especially inane is Steel's brief for Francis Townsend's scheme whereby the federal government would give $200 per month to all citizens over age sixty, on the condition that they spend it within the month. This plan, he writes, "would have increased demand, thereby stimulating investment and production"—leaving us to wonder why the government should not give every person a million dollars, since this would presumably stimulate investment and production still more. Since academia takes such normative judgments and economic fallacies for granted, few scholars are likely even to notice Steel's occasional suspension of scholarly detachment, though one can only imagine the response in academic journals if an author were so careless as to let slip a favorable reference to Warren Harding or Calvin Coolidge.

Lippmann is well known for having disagreed with much of U.S. policy during the Cold War, and for having dissented from George Kennan's diagnosis of its origins. Lippmann maintained that Kennan's analysis of the Soviet Union was fundamentally flawed; far from being ideological zealots, the Soviets were pragmatists fearful of a renewed Germany, and anxious to provide for their own security. Even worse, from Lippmann's point of view, was Kennan's strategy of "containment." To face off against the Soviet Union "at every point where they show signs of encroaching" was a "strategic monstrosity"

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that would require ceaseless American intervention, to say nothing of "recruiting, subsidizing and supporting a heterogeneous array of satellites, clients, dependents, and puppets." Rather than chasing the Soviet Union on the geopolitical periphery, the correct strategy was to reach a political settlement in Europe that would allay Soviet fears. Thus, Lippmann came to oppose America's wars in Korea and Vietnam (although, in the latter case, so did the John Birch Society). At the same time, he ridiculed the pacifism of Henry Wallace, noting that the correct position was one in which the United States would "confront power with power at a selected point where a decision is in a military sense possible, and then to use the delicate and unstable equilibrium as an opportunity to be seized for constructive and magnanimous negotiation" (p. 435).

Certainly a point in Lippmann's favor in any overall assessment of his life and work is that he did occasionally have a provocative or useful insight, unlike the drearily predictable platitudes of his tiresome modern counterparts. But, as Steel documents with approval, he was, from first to last, a social democrat, and an important intellectual architect of the edifice of statism under which we now live. When Walter Lippmann departed this world on December 14, 1974, this was the legacy he left behind.

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BUTLER SHAFFER. ***IN RESTRAINT OF TRADE: THE BUSINESS CAMPAIGN AGAINST COMPETITION, 1918–1938.*** CRANBERRY, N.J.: ASSOCIATED UNIVERSITY PRESSES, 1997. PP. 284.

A naïve view holds that politicians are benevolent and businessmen are evil; thus, any governmental measure opposed by business must be in the public interest. When such a view becomes widespread, tyranny follows. Fortunately, few Americans exhibit such ignorance.

An equally false view holds the opposite—that businessmen are intent upon serving consumers through peaceful means, and will only support those governmental measures beneficial to the commonweal. This flawed analysis is also liable to tyranny, and may even be the more pernicious, given its superficial plausibility. Many people—including this reviewer, not so long ago—subscribe to it, and politicians have often exploited this approach in their pursuit of ever-increasing power.

Of course, the fundamental flaw is to consider "business" a monolithic entity with a unitary set of interests. One must realize that the interests of textile firms do not coincide with those of automakers, nor those of "big business" with those of sole proprietorships. Indeed, one must acknowledge the initially counterintuitive notion that big business, in the battle against pesky upstarts, may actually *clamor* for increased government regulation.

Such is the claim made in Butler Shaffer's *In Restraint of Trade*. As he puts it,

> It is the purpose of this book to inquire into the attitudes of business leaders toward competition during the years 1918–38 and to see how those attitudes became translated into proposals for controlling competition through political machinery under the direction of trade associations. (p. 15)

Shaffer then proceeds with a rigorous defense of this thesis. Relying on copious quotations, he documents how the enforced cartelization of the War Industries Board in World War I offered the entrenched businesses "a temporary respite from what many regarded as the killing pace of commercial warfare" (p. 18). The rising prevalence of the collectivist creed contributed to the growing popularity of the notion that "decision-making that emphasized the well-being of the *individual firm* was to be eschewed" to emphasize "the *collective* interests of the *industry* itself" (p. 19). Indeed, the very underpinnings of the free market were being challenged:

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> One finds industry leaders and trade groups railing constantly against the "price cutter," the "cutthroat" competitor, and the entrepreneurial interloper who dared to "invade the territory" of an established competitor. (p. 19)

Early on, Shaffer details the rise of trade associations and codes of ethics, which allows for some downright entertaining quotations, a welcome delight for a book concerned with inter-war trade practices. The American Bottlers of Carbonated Beverages, for example, solemnly pledged, "My desire shall not be to undersell my fellow bottlers, but to contend with them for first place in the quality of my products and service I render my patrons" (p. 65). A prominent textile trade association offered a similar exhortation: "Legitimate competition is the life of the industry, but unscrupulous competition is injurious to yourself, to your competitor, and to your industry" (p. 65). However, the doubletalk of these codes pales in comparison to the rhetorical excellence of the American Warehousemen's Association, which framed its proscriptions of price-cutting not as an attempt to strengthen the industry, but to rescue the beleaguered consumer:

> Nothing so shakes the confidence of the Public as the knowledge that only through haggling and bargaining can it be sure of obtaining the lowest and presumably fairest rates; nothing is so unfair to the unsuspicious and trusting customer; nothing is so damning to the effort to establish confidence and good-will and to carry on our business legitimately and honestly on a plane of fair dealing with equal advantage to all. (p. 65)

Those familiar with the used-car dealer's "No Dicker Sticker!" and the wholesaler's "Every day is a sale day!" will ruefully conclude that, yes, indeed, history repeats itself.

Shaffer explains that these initially voluntary codes and associations failed in their announced purpose to eliminate "unhealthy" price-cutting, and soon turned to government to enforce such "voluntarism." He then offers the single most powerful critique of the predatory pricing bogey that this reviewer has ever seen (pp. 67–68), though it does not quite satisfy the reader acquainted with Game Theory (e.g., even if a big firm is reaping inordinate profits, why would it be strategically wise for any *individual* upstart to challenge it, if the big firm has the resources to ruin at least the first few such challengers?). Such theoretical concerns aside, Shaffer decisively demonstrates that predatory pricing is not a realistic danger, and that ostensible historical examples of the strategy are dubious.

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The book's one serious shortcoming is Shaffer's fascination with chaos theory. He attempts to defend *laissez faire* as the only policy consistent with the findings of this relatively young scientific field. Although Shaffer's treatment is commendable in that he clearly knows the subject—in contrast to other writers who have seized upon the results of chaos to justify their particular stances—it is nonetheless untenable. He does not simply offer chaos theory as a passing analogy to the economic system; rather, he devotes nine full pages to the development of his case (pp. 37–45), and returns to the theme in his concluding remarks (p. 208). Shaffer goes so far as to liken the pricing system for a given product to a "strange attractor"—a technical term—and to consider "money, new technology, information, or other resources" as "externally derived energy" in the same sense that a physicist would (pp. 37–38).

It cannot be emphasized enough that despite the philosophical interpretations of many of the theory's leading practitioners, chaos studies the behavior of *completely determinate* systems. The field's name derives from the fact that in *practice* (not in *principle*), knowledge of the system's initial state is always imperfect—which leads to hugely erroneous predictions—and also to the fact that even *with* perfect knowledge of the initial conditions, computational difficulties (due to nonlinearities) make it impossible to describe the future state of the system. The fascination with such systems derives not from their complexity *per se*—it is a trivial task to write a system of insoluble equations—but from the fact that such "chaos" can result from a few simple "laws of motion" which, at first glance, appear entirely innocuous.

Shaffer's work will be palatable to the reader acquainted with Austrian economics, and contains references to Rothbard, Kirzner, Hazlitt, Machlup, and Mises. It is, therefore, particularly odd that our author's treatment of chaos theory neglects all standard Austrian criticisms of formalism in economics—specifically, the fact that in human affairs, there *are* no constant relationships (unlike the laws governing the models of chaos). Rothbard had it right when he said that chaos theory is a welcome innovation in that it explodes the familiar claim that the results of mathematics or physics "prove" the scientific necessity of central planning, but that chaos theory itself is no paradigm for a theory of human action.

In this context, we must also frown upon Shaffer's supplemental use of the laws of thermodynamics to "justify" *laissez faire*. If the goal

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is really to "avoid an entropic death" (p. 38), then the first thing we should do is kill all the engineers, since they build those wicked machines which transform orderly fossil fuels into random thermal energy.

All such quibbles aside, Shaffer's book is a wonderful resource in which the author takes great pains to demonstrate the intellectual honesty of his account. The Introduction and first three chapters offer an airtight defense of the main thesis, while the subsequent chapters provide exhaustive quotations and data concerning the experiences of individual industries. In this respect, *In Restraint of Trade* will satisfy both the curious layman and the serious scholar.

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